# CLERK'S COPY.

## TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1932.**

## No. 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, APPELLANT,

*vs.*

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

**FILED JUNE 24, 1932**

**(36,873)**

# (36,873)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1932.**

# No. 176

---

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, APPELLANT,

*vs.*

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL., ETC.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

---

INDEX


| | Page |
|---|---|
| Proceedings in supreme court of Tennessee | 1 |
| Petition for appeal and order allowing same | 1 |
| Assignments of error | 2 |
| Bond on appeal, note re | 5 |
| Order allowing appeal | 5 |
| Citation and service, note re | 6 |
| Assignments of error | 6 |
| Opinion, Cook, J. | 7 |
| Decree | 8 |
| Petition for rehearing | 9 |
| Opinion on petition for rehearing | 11 |
| Order denying rehearing | 12 |
| Record from chancery court of Davidson County | 12 |
| Bill of complaint | 12 |
| Exhibit No. 1—List of amendments to Chapter 58, Acts of Tennessee, 1923 | 24 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 2, 1932

United States, in that Tennessee's system of taxation of railroads as compared with its taxation of competing common carriers by motor vehicle is palpably arbitrary and unreasonably discriminatory, all of which is fully apparent in the record and proceedings in said cause and specifically set forth in the assignment of errors filed herein.

Wherefore The Nashville, Chattanooga & St. Louis Railway, appellant, prays that upon execution by it of a proper bond, duly and legally approved, appeal may be granted in its behalf in said cause to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said the Supreme Court of the United States at Washington.

This June 21, 1932.

The Nashville, Chattanooga & St. Louis Railway, by Fitzgerald Hall, Vice-President & General Counsel.

Appeal is hereby allowed as prayed upon The Nashville, Chattanooga & St. Louis Railway making bond as required by law in the sum of Twenty-Five Hundred Dollars.

This June 21, 1932.

Grafton Green, Chief Justice of the Supreme Court of the State of Tennessee.

---

[fol. 5] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 21, 1932

The Nashville, Chattanooga & St. Louis Railway, appellant in this cause, in connection with its petition for an appeal this day filed, to wit, June 21, 1932, shows the following errors which it avers occurred in the proceedings in this cause and on the trial thereof and in the opinion and judgment of the Supreme Court of the State of Tennes-

see and upon which it relies to reverse said judgment entered herein as appears of record.

I

The Supreme Court of the State of Tennessee erred in holding that Chapter 58 of the 1923 Acts of Tennessee, as amended, the caption of said chapter 58 of the 1923 Acts of Tennessee, and the caption of its principal and only relevant amendment, to wit, Chapter 67 of the 1925 Public Acts of Tennessee, being respectively in words and figures as follows:

"An act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State."

[fol. 6] "An act to amend an act entitled: 'An Act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State,' being Chapter 58 of the Public Acts of 1923, so as to amend the caption by including the words, 'or storing or distributing' after the word 'selling' in the third line of the caption of the printed Act as published, and by amending the body of the Act by imposing the tax upon persons, firms, associations, joint stock companies, syndicates and corporations storing or distributing any of the products mentioned in said Act."

is constitutional, first, because said act, as amended, directly and unreasonably burdens interstate commerce contrary to the "commerce clause" of the Federal Constitution (Paragraph 3 of Section 8 of Article I of the Consti-

tution of the United States), in that it imposes upon appellant, an interstate common carrier by railroad, a tax for "carrying on the business in this State of selling, storing and distributing gasoline * * *," when all appellant does is to use gasoline as it uses many other commodities in the direct and essential operation of interstate commerce by railroad; and, second, because said statute, as amended, is an integral part of Tennessee's system of taxation of railroads, which as compared to the system adopted and enforced on appellant's competitors, common carriers by motor vehicle, is so palpably arbitrary and so unreasonably discriminatory as to violate the "due process" and "equality" clauses of the Fourteenth Amendment to the Constitution of the United States.

II

The Supreme Court of the State of Tennessee erred in overruling appellant's first assignment of error in that court, which was in words and figures as follows: "The court erred in dismissing the Railway's bill."

[fol. 7]

III

The Supreme Court of the State of Tennessee erred in overruling appellant's third assignment of error in that court, which was in words and figures as follows:

"The court erred in holding that Chapter 58 of the 1923 Acts of Tennessee, as amended, was valid as to The Nashville, Chattanooga & St. Louis Railway and that said Railway had to conform thereto just as those who are in fact engaged in the business of selling, storing and distributing gasoline."

IV

The Supreme Court of the State of Tennessee erred in overruling appellant's fourth assignment of error in that court, which was in words and figures as follows:

"The court erred in not holding that said Chapter 58 of the 1923 Acts of Tennessee, as amended, was not applicable to such an interstate railroad as The Nashville, Chattanooga & St. Louis Railway; and, further, that being applicable it was not invalid, because

(a) It imposed upon a corporation chartered only to run a railroad a privilege tax for the necessary use of one of the many commodities essential to railroad operation;

(b) It directly burdens and unreasonably discriminates against interstate commerce by railroad."

V

The Supreme Court of the State of Tennessee erred in overruling appellant's fifth assignment of error in that court, which was in words and figures as follows:

"The court erred in not holding that Tennessee's system of taxation of railroads, as compared with competing common carriers by motor vehicle, was palpably arbitrary and unreasonably discriminatory in violation of the "due process" and "equality" clauses of the Fourteenth Amendment."

For which errors the appellant, The Nashville, Chattanooga & St. Louis Railway, prays that said judgment of the Supreme Court of the State of Tennessee dated June 4, 1932, in the above cause be reversed and that the appellees be taxed with the costs.

This June 21, 1932.

[fol. 8] The Nashville, Chattanooga & St. Louis Railway, by Fitzgerald Hall, Vice-President & General Counsel.

---

[fols. 9 & 10] Bond on appeal for $2,500, approved and filed June 21, 1932, omitted in printing.

---

[fol. 11] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

ORDER ALLOWING APPEAL—Filed June 21, 1932

This cause came on to be heard upon the petition of The Nashville, Chattanooga & St. Louis Railway, appellant in this cause, for an appeal to the end that said cause may be transferred as provided by law to the Supreme Court of the United States for final determination.

And it appearing to the court that The Nashville, Chattanooga & St. Louis Railway has in proper manner challenged the constitutional validity of certain statutes of the State of Tennessee on the ground that same are repugnant to the Constitution of the United States and this court having found by opinion filed June 4, 1932, that said statutes are valid and enforceable, and applicable to the said Railway, and The Nashville, Chattanooga & St. Louis Railway having filed an appeal bond in the sum of Twenty-Five Hundred Dollars satisfactory to the Chief Justice of this court.

It is, therefore, ordered, adjudged and decreed that an appeal as prayed be and the same hereby is allowed to the Supreme Court of the United States.

It is further ordered that a transcript of the record, proceedings, papers, opinions and judgment in this cause shall be prepared, certified and transmitted by the Clerk of the Supreme Court of Tennessee to the Supreme Court of the United States at Washington in the manner provided by law, so that he shall have the same in said court within thirty [fol. 12] days of this date, to the end that said court may inspect the same and do what according to law should be done.

This the 21 day of June, 1932.

Grafton Green, Chief Justice of the Supreme Court of the State of Tennessee.

---

[fol. 13] Citation, in usual form, showing service on Roy H. Beeler, filed June 21, 1932, omitted in printing.

---

[fol. 14] IN SUPREME COURT OF TENNESSEE

ASSIGNMENTS OF ERROR

I

The Court erred in dismissing the Railway's bill. (R. 31-32.)

II

The Court erred in holding that Chapter 58 of the 1923 Acts of Tennessee, as amended, was applicable to the Nashville, Chattanooga & St. Louis Railway. (R. 31-32.)

III

The court erred in holding that Chapter 58 of the 1923 Acts of Tennessee, as amended, was valid as to The Nashville, Chattanooga & St. Louis Railway and that said Railway had to conform thereto just as those who are in fact engaged in the business of selling, storing and distributing gasoline. (R. 31-32.)

IV

The court erred in not holding that said Chapter 58 of the 1923 Acts of Tennessee, as amended, was not applicable to such an interstate railroad as The Nashville, Chattanooga & St. Louis Railway; and, further, that being applicable it was not invalid, because

(a) It imposed upon a corporation chartered only to run [fol. 15] a railroad a privilege tax for the necessary use of one of the many commodities essential to railroad operation;

(b) It directly burdens and unreasonably discriminates against interstate commerce by railroad. (R. 31-32.)

V

The court erred in not holding that Tennessee's system of taxation of railroads, as compared with competing common carriers by motor vehicle, was palpably arbitrary and unreasonably discriminatory in violation of the "due process" and "equality" clauses of the Fourteenth Amendment. (R. 31-32.)

---

[fol. 16] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

vs.

ROY C. WALLACE, Comptroller, et al.

Davidson Equity

OPINION—Filed April 30, 1932

The bill was filed under the declaratory judgments law to determine whether the complainant is subject to the tax

imposed by the State revenue law upon those "engaged in or carrying on the business of storing or distributing gasoline." The defendant demurred to the bill and the demurrer was sustained.

Complainant's appeal involves the application of the interstate commerce clause of the Constitution of the United States. It insists that the gasoline stored and used by it is devoted exclusively to the promotion of its business as an interstate commerce carrier.

Pending consideration of the case in this court, three judges sitting in the District Court of the United States passed upon the question in the case of American Airways, [fol. 17] Inc. v. Roy C. Wallace, Comptroller, and held that the tax applied to those storing and distributing gasoline, notwithstanding its ultimate use for the promotion of interstate commerce.

Notwithstanding a minority of the members of this Court do not concur in the reasoning and conclusion of the United States District Court, we are of the opinion that it is the duty of the court to follow the decision of the United States Court sitting in this jurisdiction, with the result that the decree of the chancellor is affirmed.

Cook, J.

---

[fol. 18] IN SUPREME COURT OF TENNESSEE

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

vs.

ROY C. WALLACE, Comptroller, et al.

Davidson Equity

Affirmed

DECREE—April 30, 1932

This cause came on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that the demurrer be sustained, the original bill be dismissed and that the N. C. & St. L. Ry. Co., principal and Fitzgerald Hall and Seth Walker, sureties, will pay all of the costs of this cause, for which let fi. fa. issue.

---

[fol. 19] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE, AT NASHVILLE

[Title omitted]

PETITION FOR REHEARING—Filed May 4, 1932

MAY IT PLEASE THE COURT: We file this petition, not to ask a rehearing on the question actually decided by this honorable Court in its decision of April 30th 1932, but to request that two vital questions raised in the original bill and in the assignments of error, brief and argument in this honorable Court be disposed of, to the end that when the case goes as is expected, to the Supreme Court of the United States all questions will have been decided by this honorable Court and all may therefore be reviewed by that Court.

I

It was set forth in detail in paragraph (a) of Section VII of the original bill that approximately forty per cent of the [fol. 20] gasoline in question was neither purchased nor consumed in Tennessee, but was temporarily located at petitioner's Nashville shops for inspection pending use by petitioner thereof in the states of Kentucky, Alabama and Georgia.

The prayer of the petition asked this honorable Court to determine whether the statutes under attack, if valid and applicable, applied to "both that actually used and consumed in railroad operations in Tennessee and that actually used and consumed in railroad operations in the states of Kentucky, Alabama and Georgia * * *." As

approximately forty per cent of the tax in question applies to gasoline never sold in Tennessee and never used in Tennessee, it is respectfully urged that it is of great importance that this honorable Court determine whether the statutes in question apply only to the gasoline which this Railway uses in Tennessee, or to that which it also uses in Kentucky, Alabama and Georgia.

This question was properly made in the original bill and was before this honorable Court on the original hearing, but it was not decided and yet it is of vital import in the permanent clarification as to the validity and construction of these statutes.

II

The opinion of this honorable Court deals solely with the [fol. 21] challenge to the statutes in question predicated on the commerce clause of the Federal Constitution.

However, the original bill, particulary in Section IX, challenged the validity of the statutes in question under the Fourteenth Amendment.

This was the basis of the fifth assignment of error in this honorable Court.

The case in the United States District Court at Nashville, to wit, American Airways, Incorporated, vs. Roy C. Wallace, Comptroller, which is the basis of the decision of this honorable Court, did not involve any such question and there was no consideration or discussion of that feature of the present case.

We set out in detail in the bill of complaint, as aforesaid, particularly in said Section IX, the facts showing what we believed to be a deliberate, material discrimination against railroads. This is one of the vital questions in the case and it was not touched upon, directly or indirectly, in the decision of this honorable Court.

These questions growing out of the taxation of gasoline are difficult and the sooner they are all decided by the Supreme Court of the United States the better we will all be able to know our exact rights and obligations.

[fol. 22] We, therefore, express the very earnest hope that this honorable Court will find it consistent to specifically pass upon the two questions hereinabove referred to, to the end that when the case goes to the Supreme Court of the United States, if it should so go, that said Court

will have before it the views of this honorable Court on all the vital questions raised.

For these reasons we respectfully ask a rehearing on these two questions.

Conformably to the rules of this honorable Court a copy of this petition has been served upon adversary counsel.

Respectfully submitted.

Seth M. Walker, Fitzgerald Hall, Attorneys for the Nashville, Chattanooga & St. L. Railway.

May 4, 1932.

---

[fol. 23] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

OPINION ON PETITION TO REHEAR—Filed June 4, 1932

In the memorandum opinion filed April 30, the court affirmed the decree of the chancellor in which he held defendant liable for the privilege tax imposed upon the storage of gasoline in the State. The determination rested upon the decision of the United States District Court in the cause of American Airways, Inc. v. Roy C. Wallace, Comptroller. The complainant asks a response to pretermitted assignments of error based upon other questions presented by the pleadings and stipulation of fact.

Responding to the petition for rehearing:

First. The privilege tax upon the storage of gasoline extends to the 40 per cent of gasoline distributed by complainant from its storage plant in Tennessee for use in railroad operations upon its lines in other States. This is so because as said in American Airways, Inc. v. Wallace, [fol. 24] Comptroller, the tax is upon the exercise of the privilege of storing gasoline and the tax fastens upon gasoline when stored without regard to the place of ultimate use.

Second. The tax imposed upon those storing gasoline applies to all alike. The statutes made no discrimination and

it does not therefore contravene the provisions of the Fourteenth Amendment.

A rehearing will therefore be denied.

---

[fol. 25] In Supreme Court of Tennessee

[Title omitted]

Order Denying Petition for Rehearing—June 4, 1932

This cause coming on further to be heard upon petition to rehear, upon consideration whereof the Court is of opinion that petition should be and it is hereby denied at the cost of petitioner, for which let fi. fa. issue.

---

[fol. 26] [File endorsement omitted]

[fol. 27] [Caption omitted]

In Chancery Court of Davidson County

#43885

Bill of Complaint of the

Nashville, Chattanooga & St. Louis Railway, a Tennessee Corporation, Complainant,

versus

Roy C. Wallace, Comptroller of the Treasury of the State of Tennessee; Chas. M. McCabe, Commissioner of Finance and Taxation of the State of Tennessee, and L. D. Smith, Attorney-General of the State of Tennessee, All Residents of Nashville, Davidson County, Tennessee, Defendants.

Original Bill—Filed September 29, 1931, at 11:15 A. M.

To the Honorable R. B. C. Howell, Chancellor, holding part one of the Chancery Court of Davidson County, Tennessee, at Nashville:

[fol. 28] Complainant respectfully states and shows to the Court:

I

That it is a corporation chartered by charter I of the Acts of Tennessee of 1845-1846, as a common carrier by railroad, operating lines engaged in both interstate and intrastate commerce in the States of Tennessee, Kentucky, Alabama and Georgia, having its principal office at Nashville, Davidson County, Tennessee, within the jurisdiction of this Court.

II

(a) Respondent Roy C. Wallace is the legally elected and duly qualified Comptroller of the Treasury of the State of Tennessee, is a resident of Nashville, Davidson County, Tennessee, and is being sued herein in his official capacity as Comptroller.

(b) Respondent Chas. M. McCabe is the duly appointed and qualified Commissioner of Finance and Taxation of the State of Tennessee, with powers fixed by statute, particularly sections 8 and 12 of Chapter 7 of the 1923 Acts of Tennessee; is a resident of Davidson County, within the jurisdiction of this Court, and is being sued in his official capacity as Commissioner of Finance and Taxation.

(c) Respondent L. D. Smith is the Attorney General of the State of Tennessee, and, as such, is the chief law officer [fol. 29] of the State, is a resident of Davidson County, Tennessee, within the jurisdiction of this Court, and is made a party hereto pursuant to the provisions of section 11 of Chapter 29 of the 1923 Public Acts of Tennessee, known as the "Uniform Declaratory Judgments Act" under which this suit is brought.

III

This is a suit under Chapter 29 of the 1923 Public Acts of Tennessee, officially cited as the "Uniform Declaratory Judgments Act," to determine whether complainant is legally obligated to pay a gasoline privilege tax as provided by Chapter 58 of the 1923 Acts of Tennessee, and the amendments thereof; and also to determine the construction and validity of said Tennessee statutes as applicable to the facts hereinafter stated. Complainant's rights and obligations under said statutes are now in issue as will be hereinafter more fully set forth.

IV

Respondent Roy C. Wallace, as Comptroller of the Treasury of Tennessee, is obligated and empowered to collect taxes due under said Act, by virtue of the provisions of section 9 of Chapter 58 of the 1923 Acts, as amended by Chapter 124 of the Acts of 1929. He, in his official capacity, upon advices of respondent Commissioner of Finance [fol. 30] and Taxation, Chas. M. McCabe, has called upon complainant to pay to the State of Tennessee privilege taxes alleged to be due under said Chapter 58 of the 1923 Acts of Tennessee, as amended, in the sum of Thirteen Thousand, Three Hundred Eighty-one and 23/100 ($13,381.23) Dollars.

The liability of complainant to pay this sum has been the matter of frequent conferences between representatives of the complainant and of respondents and their predecessors in office, and respondents have now determined to undertake to require complainant to pay this sum, and further sums in the future, which sums complainant claims are not legally due, and the question at issue is whether such sums are due, or not, and this calls for a construction of said statutes and of a determination of their validity, as hereinafter more fully set out.

V

(a) The caption of chapter 58 of the 1923 Acts of Tennessee is as follows:

[fol. 31] "An act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance o fa highway system in the State."

The object and purpose of this Act was to impose a privilege tax upon those "engaged in or carrying on the business in this State of selling gasoline," as a method of financing the highway system of Tennessee.

Complainant is not now and never has been engaged in the business of selling gasoline, nor has it at any time ever manufactured or distributed or sold gasoline in Tennessee; nor has it ever operated a gasoline business.

(b) The caption of Chapter 67 of the 1925 Public Acts of Tennessee is as follows:

"An act to amend An Act entitled 'An Act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax for [fol. 32] engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State,' being Chapter 58 of the Public Acts of 1923, so as to amend the caption by including the words, 'or storing or distributing' after the word 'selling' in the third line of the caption of the printed Act as published, and by amending the body of the Act by imposing the tax upon persons, firms, associations, joint stock companies, syndicates and corporations storing or distributing any of the products mentioned in said Act."

The object of this statute was to enlarge the scope of said Chapter 58 of the 1923 Public Acts so as to impose a privilege tax, not merely upon selling, but also upon "storing or distributing" gasoline.

Complainant has never stored any gasoline but buys the same only in such quantities as may be necessary for its own uses and has never distributed any gasoline except on its own property for its own immediate railroad uses.

(c) Said Chapter 58 of the 1923 Public Acts and Chapter 67 of the 1925 Public Acts have been amended several times to change the amount of tax, the methods of collection and administrative details. An accurate detailed list of all such statutes, in chronological order, is attached hereto marked [fol. 33] Exhibit 1, but not for copy. These amendatory statutes do not change the theory of said Act of 1923, as amended by said Act of 1925.

(d) None of the funds collected by the State under said Chapter 58 of the 1923 Public Acts, as amended, are used

for the benefit of the complainant, but on the contrary, as will be hereinafter shown, are used for the benefit of complainant's competitors.

VI

(a) Complainant does not now and never has sold any gasoline in the State of Tennessee or outside of the State of Tennessee, or engaged in the gasoline business.

(b) Complainant does not store gasoline for any person, firm or corporation, and has never distributed or delivered any gasoline to any person, firm or corporation.

Complainant buys all its railroad supplies through its Purchasing Agent at Nashville and most of these are delivered to the storehouse at the Nashville Shops for checking as to quality and quantity and dispensing over its system as the exigencies of railroad operation demand. It buys gasoline, not for storage, but for immediate, or substantially so, use. The normal supply on hand at any one time will last on the average about thirty days and is replenished currently as needed. Complainant in order to properly operate its railroad must keep on hand coal, gasoline, lubri- [fol. 34] cants, cross-ties and other materials for not less than thirty days' needs. All gasoline so purchased is used exclusively by complainant on its own railroad property—none is ever used on any public highway. Third parties use none of it.

(c) Complainant is not in the gasoline business in any way whatsoever, and its only use of gasoline is in exactly the same category as coal, lubricating oil and other supplies used in railroad operation.

VII

(a) Complainant buys gasoline from producers outside the state and it is delivered from time to time in interstate shipments to complainant at its storehouse at its shops in Nashville in quantities sufficient, as a rule, to care for approximately thirty days' use. After such gasoline is received through such interstate shipments, as aforesaid, approximately sixty per cent is consumed by complainant in Tennessee and approximately forty per cent is consumed by complainant in the States of Kentucky, Alabama and Georgia. None of the gasoline so purchased and received is ever

used in any vehicle on any public highway but is consumed exclusive in the operation of complainant's railroad.

(b) Complainant uses gasoline in various ways; for example, but not intended as an exclusive statement, the following:

[fol. 35] 1. On most of complainant's main line, all of which is a through highway of interstate commerce, automatic electric signals have been installed. These signals are inspected every day for efficiency and safety by specialists trained for that purpose. These signal maintainers each have several miles of track within their respective jurisdiction, and move over this track in little velocipedes or motor cars, the motive power of which is furnished through the use of gasoline purchased by complainant, as aforesaid, and dispensed as occasion requires all over its system for this purpose.

2. Complainant has all over its system section crews to inspect and maintain its track in proper condition. These men inspect the track practically every day, examine cross ties, rails, bridges and track fixtures over which trains regularly and daily move in interstate and intrastate commerce. They carry with them the usual supplies of tools and materials for such purposes. Each such section crew has jurisdiction of several miles and they move up and down the track within their allotted territory on little motor cars, the motive power of which is furnished by gasoline purchased by complainant, as aforesaid, and dispensed as occasion required by it over its system in the four states in which it operates.

3. Many parts of the tools which complainant has in its various shops, and many parts of the running equipment of complainant's locomotives, cars and coaches, must be [fol. 36] regularly cleaned, and this can best be done by the use of gasoline, and complainant uses a great deal of the gasoline purchased, as aforesaid, in cleaning its tools and equipment on its own property exclusively. Gasoline for from its Nashville shops as the operating necessities re such uses is distributed over the system by complainant from its Nashville shops as the operating necessities require.

4. Complainant has shops at many places in the four states in which it operates and some of these are quite ex-

tensive in territory. Many of the tools and materials used in repairing railroad equipment are extremely heavy and they are generally carried from place to place, within complainant's various shops, on little cars known as "mules," the motive power of which is furnished through the medium of gasoline purchased as aforesaid. None of these so-called "mules" are ever used off of complainant's private property and none of them ever get on any public highway.

5. The four examples above set out are typical but not exclusive of the uses to which complainant puts the gasoline sought to be taxed through the medium of the statutes above set out.

(c) Complainant uses some gasoline in automobiles on the public highways, but none of that gasoline is taken from the gasoline purchased as aforesaid by complainant on which the tax in question is sought to be levied. All of such gasoline not used in the direct operation of com- [fol. 37] plainant's railroad is bought from public dealers and the tax in question paid thereon.

VIII

(a) The tax authorized by said Chapter 58 of the 1923 Public Acts of Tennessee, as amended, as aforesaid, is not, so complainant is advised and avers, an ad valorem or property tax; nor is it imposed in the exercise of the police power as are inspection taxes; but is a method of financing Tennessee's highway system by requiring those who use gasoline to pay in proportion to the use of the public highways; and while this tax on its face is a privilege tax on those engaged in the business of selling, storing and distributing gasoline, said tax is, in fact, always passed on to the public and was so intended and all the various distributors, and sellers, and storers throughout the state advertise publicly, first, the actual price of the gasoline, and second, add thereto the amount of tax provided by this series of statutes. Complainant, as aforesaid, having never engaged in any business except operating its railroad and using none of the gasoline here sought to be taxed on the public highways is advised and avers that said statutes are not applicable to it, or if applicable, then they are invalid as hereinafter set forth.

(b) All of the funds collected under this series of acts commencing with said Chapter 58 of the 1923 Public Acts go exclusively to the maintenance and construction of the [fol. 38] highway system of the State. None of such taxes go into the general fund of the State and none are available for any except road or similar purposes. No part of these funds are expended for facilities which complainant can or does use. Said tax was intended to be and is in fact passed along to the users of gasoline, most of which are operators of automobiles; and the theory of said series of acts is that thus motor vehicle users pay for the highways in proportion to their respective use.

Complainant uses none of the gasoline here involved on the public highways but exclusively in the operation of its railroad on its own property, hence complainant is advised and avers, that these acts being intended to ultimately collect from road users in proportion to their use do not apply to the gasoline used by it in running its railroad on its own private property.

(c) One of the Acts of this series is Chapter 124 of the 1929 Acts which requires distributors, dealers, and/or storers to get permits before engaging in such business. Complainant has never obtained a permit; nor have the constituted authorities ever suggested that complainant get a permit. The question of complainant's liability hereunder has been the subject of frequent conferences with the administrators of these acts and the practical construction actually put on the same is that complainant need procure no such permit, thus indicating that said series of acts are not applicable to it.

[fol. 39] IX

(a) The series of acts here involved commencing with said Chapter 58 of the 1923 Acts constitutes the chief source of current revenues (except repeated bond and note issues) for the construction and maintenance of Tennessee's highway system and the theory thereof, as aforesaid, is that those using the highways shall by this system pay in proportion to their use. None of the gasoline here involved is ever used by complainant or others except on complainant's own private property in the operation of its railroad.

(b) Complainant is already the subject of gross and, it is believed, illegal discrimination under the laws of Tennessee in the matter of its taxes as compared with its competitors on the public highways. Under the Tennessee laws now in force motor carriers for hire obtain a highway bought and maintained by the State and governmental protection for approximately, on the average, five cents out of each dollar of gross revenue; while Tennessee railroads for the same thing must, on the average, pay approximately thirty-three cents out of each dollar of gross revenue. In other words, every kind of tax paid by motor carriers for hire (ad valorem, privilege, license, income, registration and gasoline) costs on the average five cents out of each dollar of gross revenue for which such motor carriers for hire receive not only governmental protection (as do all tax payers including railroads) but a highway to do business on in competition with railroads, said highway being [fol. 40] constructed and maintained by the State. To obtain the same thing railroads, on the average, as aforesaid, must pay out approximately thirty-three cents out of each dollar of gross revenue.

(c) These facts in detail were presented to the last General Assembly and other public officials, were never disputed, are well and generally known, yet the constituted authorities have been and are willing to take no action to remove this palpable and arbitrary discrimination against railroads such as complainant.

Filed herewith, marked Exhibits Numbers 2 and 3, and made a part hereof, but not for copy, are index numbers 42 and 47 of the detailed data presented by complainant to the 1931 Tennessee General Assembly and to the Interstate Commerce Commission, giving the details, completely and accurately, as to such discrimination.

(d) To require complainant (in addition to the disproportionate tax burden it now bears) to pay a tax on gasoline used solely in the operation of its railroad to help construct and maintain a highway for its competitors to use substantially free is, so complainant is advised and avers, a direct burden on interstate commerce, arbitrary discrimination against interstate commerce by railroad, so palpably arbitrary and unreasonable as to lack due pro-

cess of law, and so unreasonably discriminatory as to deny [fols. 41 & 42] complainant the equal protection of the laws.

X

Assuming, without admitting, that said chapter 58 of the 1923 Acts, and the amendments thereto, are applicable to gasoline used, as aforesaid, by complainant, then complainant is advised and avers that said Chapter 58 of the 1923 Acts, and the amendments thereto, are, as to it, and to the gasoline now sought to be taxed, null and void, for the following reasons:

(a) The General Assembly of Tennessee may impose only such taxes as are authorized by the Constitution of Tennessee and its powers in this respect are limited to sections 28, 29 and 30 of Article 2 of the Tennessee Constitution, which authorizes only three kinds of taxes, to wit, income, property or ad valorem, and privilege. Under said provisions the General Assembly of Tennessee may not constitutionally impose a tax upon the mere consumption of an article involving no use of public property as, for example, the eating of corn, the burning of coal, or the combustion of gasoline. The use by complainant of the gasoline here sought to be taxed, as above set out, is merely the consumption of gasoline as an incident to the operation of its railroad and involves no use of public property. The General Assembly of Tennessee has no constitutional power to make mere individual consumption of such a commodity the basis of a privilege tax, when disconnected with the use of public property.

[fol. 43] (b) All of said gasoline here sought to be taxed is used by complainant on its property for the operation of its interstate railroad. It is received by complainant in interstate commerce from other states at its general concentration point for materials and supplies at the Nashville shops and from that place dispensed, as occasion requires, always by complainant, and always on its own property, for use solely in the operation of complainant's railroad, all of the tracks being highways of interstate commerce and practically every train operated carries either freight, passengers, mail or express, moving in interstate commerce. The use of gasoline, as aforesaid, is indispensable to the proper and economical operation of interstate commerce; and said

statutes if applicable to gasoline so used, in effect impose a privilege tax on interstate commerce and directly burden such commerce contrary to the "commerce clause" of the Federal Constitution, hence are null and void.

(c) All of complainant's properties, lands, improvements thereon, tools, bridges and rolling stock are taxed ad valorem by the State of Tennessee, its counties, cities and special taxing districts; its franchises are so taxed; and it pays a state privilege and income tax on its intrastate operations, so that complainant as shown by said exhibits 2 and 3 already is taxed about 400 per cent more than its motor vehicle competitors. To require railroads, such as your complainant, to pay, in addition to all general taxes as aforesaid, a privilege tax for using gasoline in the operation [fol. 44] of its railroad in order to help construct and maintain highways for its competitors by motor vehicle, which are numerous and in active and successful competition with complainant on every part of its lines in Tennessee, is, so complainant is advised and avers, a direct and illegal burden on interstate commerce; arbitrary and unreasonable discrimination against railroads and against interstate commerce by railroads; and so palpably arbitrary, unreasonable and discriminatory that said chapter 58 of the 1923 Acts, and the amendments thereto, are null and void as violating the "commerce" clause of the Federal Constitution, the "law of the land" clause of the Tennessee Constitution, and the "due process" and "equality" clauses of the Fourteenth Amendment.

XII

Complainant is entirely able and willing to make any bond which to the Court seems proper pending a final decision of this cause, or is entirely willing, if that be deemed either necessary or proper, to deposit in Court, or in such bank as the Court may direct, and subject to the Court's orders, the total sum of money alleged to be due.

XIII

Complainant is advised and avers that it is entitled to file this bill in this honorable Court to have the statutes in question construed and their validity determined to the ex- [fol. 45] tent that they may be held to apply to the gasoline

used by complainant, as aforesaid, in the operation of its railroad.

Premises considered, Complainant asks leave to file this bill in this Honorable Court; that the parties named herein as respondents be made such by the service of process compelling them, and each of them to appear at an early rule day of this Court to answer this bill, but not under oath, answer under oath being expressly waived.

Complainant prays that the Court find that it does not owe the sum of money claimed by respondents, or any sum as a privilege tax under said statutes.

Complainant further prays that said Chapter 58 of the 1923 Acts of Tennessee, and the statutes amendatory thereof, be construed to determine whether they apply to such an interstate carrier as complainant, and if so, to determine their validity under the facts and circumstances as hereinbefore set out.

Complainant specifically prays that said Chapter 58 of the 1923 Public Acts, as amended, be held invalid to the extent that it may apply to gasoline used by complainant in the operation of its railroad, on the grounds and for the reasons hereinabove set forth.

Complainant further prays for such other, further and [fol. 46] general relief as it may be entitled to in the premises.

The Nashville, Chattanooga & St. Louis Railway, by J. B. Hill, President. Seth M. Walker, Fitzgerald Hall, Solicitors.

Attest:

T. A. Clarkson, Secretary. (Seal.)

I am security for all costs.

Fitzgerald Hall.

[fol. 47] *Duly sworn to by J. B. Hill. Jurat omitted in printing.*

I am security for the costs of this cause.

Seth M. Walker.

[fol. 48] EXHIBIT No. 1 TO ORIGINAL BILL

Chapter 58, Acts of Tennessee, 1923.

Amendments:

Chapter 4, Acts 1925.
Chapter 13, Acts 1925.
Chapter 19, Acts 1925.
Chapter 20, Acts 1925.
Chapter 67, Acts 1925.
Chapter 11, Acts 1929.
Chapter 27, Acts 1929.
Chapter 124, Acts 1929.
Chapter 19, Acts Extra Session 1929.
Chapter 28, Acts Extra Session 1929.
Chapter 30, Acts Extra Session 1929.
Chapter 40, Acts 1931.

---

[fol. 49] EXHIBIT No. 2 TO ORIGINAL BILL

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 23400

Exhibit —. Witness: Barham. Reporter —— ——.
Date: March —, 1931

Index No. 42

A Statement showing the cost of Maintenance of Way and Structures, Taxes and Interest on Way and Structures to the N., C. & St. L. Ry. for period 1921-1930, inclusive.

This statement is intended to show the proportion of each dollar earned by the N., C. & St. L., now necessarily allocated to the cost of taxes, maintenance of way and structures and interest on investment in Way and Structures. For ten years this allocation has on the average exceeded 33 cents for each dollar of revenue earned and contrasts with 5 cents of each dollar earned by truck lines expended for the items named.

(Here follows statement, side folio 50)

[fol. 50]

| Years | Column 1<br>Average miles of road operated | Column 2<br>Value of way and structures of the N., C. & St. L. Ry. (See Note 1) | Column 3<br>Total operating revenues of the N., C. & St. L. Railway for years shown | Exp<br>nan<br>stru<br>show |
|---|---|---|---|---|
| 1921 | 1,258.50 | $56,949,958 | $20,924,602 | |
| 1922 | 1,258.54 | 57,471,229 | 22,353,763 | |
| 1923 | 1,258.49 | 59,662,798 | 24,801,787 | |
| 1924 | 1,258.95 | 60,698,623 | 23,601,646 | |
| 1925 | 1,259.04 | 61,873,838 | 24,000,050 | |
| 1926 | 1,259.53 | 63,245,757 | 24,023,878 | |
| 1927 | 1,259.78 | 63,789,494 | 22,905,626 | |
| 1928 | 1,259.76 | 64,536,300 | 23,335,033 | |
| 1929 | 1,235.26 | 65,234,540 | 23,203,724 | |
| 1930 | 1,203.39 | 66,096,005 | 19,317,453 | |
| Average | 1,251.12 | $61,955,854 | $22,846,756 | |

(B-243, corrected)s (Continued on page 2.)

| g rev-<br>N., C.<br>ay for<br>n | Column 4<br>Expenses for maintenance of way and structures for years shown (See Note 2) | Column 5<br>Taxes for year shown (See Note 3) | Column 6<br>Interest on value or return on investment in way and structures at 5% per annum | Column 7<br>Cost, total of columns 4, 5, and 6 | Column 8<br>Cost per mile of road operated (column 7 divided by col. 1) |
|---|---|---|---|---|---|
| 02 | $3,201,572 | $750,000 | $2,847,498 | $6,799,070 | $5,403 |
| 63 | 3,481,360 | 620,000 | 2,873,561 | 6,974,921 | 5,542 |
| 87 | 4,554,318 | 901,900 | 2,983,140 | 8,439,358 | 6,706 |
| 46 | 3,736,177 | 851,900 | 3,034,931 | 7,623,008 | 6,055 |
| 50 | 3,656,724 | 959,516 | 3,093,692 | 7,709,932 | 6,124 |
| 78 | 3,680,983 | 1,275,000 | 3,162,288 | 8,118,271 | 6,445 |
| 26 | 3,310,422 | 1,160,997 | 3,189,475 | 7,660,894 | 6,081 |
| 33 | 3,319,458 | 1,178,923 | 3,226,815 | 7,725,196 | 6,132 |
| 24 | 2,910,609 | 1,281,000 | 3,261,727 | 7,453,336 | 6,034 |
| 53 | 3,111,807 | 967,537 | 3,304,800 | 7,384,144 | 6,136 |
| 56 | $3,496,343 | $994,677 | $3,097,793 | $7,588,813 | $6,066 |

[fol. 51]

4—176

| Years | Percentages of Gross Revenue or Proportion of Each Dollar Earned Expended for— Maintenance of way and structures | Taxes | Interest on investment in way and structures | Total (per cent) | Percentage or proportion of each dollar earned by bus and truck lines expended for taxes, maintenance of roadway, and interest on investment in roadway. (See Note 4) |
|---|---|---|---|---|---|
| 1921 | 15.30 | 3.58 | 13.61 | 32.49 | 5 |
| 1922 | 15.57 | 2.77 | 12.85 | 31.19 | 5 |
| 1923 | 18.36 | 3.64 | 12.03 | 34.03 | 5 |
| 1924 | 15.83 | 3.61 | 12.86 | 32.30 | 5 |
| 1925 | 15.24 | 4.00 | 12.89 | 32.13 | 5 |
| 1926 | 15.32 | 5.31 | 13.16 | 33.79 | 5 |
| 1927 | 14.45 | 5.07 | 13.92 | 33.44 | 5 |
| 1928 | 14.23 | 5.05 | 13.83 | 33.11 | 5 |
| 1929 | 12.54 | 5.52 | 14.06 | 32.12 | 5 |
| 1930 | 16.11 | 5.01 | 17.11 | 38.23 | 5 |
| Weighted average | 15.30 | 4.35 | 13.56 | 33.21 | 5 |

NOTE 1.—The value of Way and Structures of the N., C. & St. L. Ry. is determined as follows: The cost of reproduction (new) less depreciation found by the Commission is subdivided under several headings including "Road" (accounts 1 to 44). The latter substantially represents "Way and Structures." However, it is felt that some few items under this heading should be eliminated so that a more accurate value of Way and Structures can be obtained. These items are Account Numbers: 16 (Station and Office Buildings); 17 (Roadway Building); 18 (Water Stations); 19 (Fuel Stations); 20 (Shop and Engine Houses); 22 (Storage Warehouses), and 44 (Shop Machinery).

NOTE 2.—The "expenses for Maintenance of Way and Structures" shown above includes an apportionment of 20% of General Expenses (as per the Commission's Classification of Accounts) for the years shown. In respondent's opinion this represents a proper charge to the expense of maintenance of Way and Structures.

NOTE 3.—Under the heading of "Taxes" shown above is included 1/3 of the rental paid by the N., C. & St. L. Railway to the State of Georgia for the use of the W. & A. R. R. The proportion, viz: $200,000 per year, represents respondent's opinion of a fair amount of the rental paid to be apportioned to taxes.

NOTE 4.—The per cent or proportion of each dollar earned by bus lines expended for taxes, maintenance of roadway and interest on investment in roadway is taken from "A Study of 1929 Motor Bus Operating Costs" published by the National Association of Motor Bus Operators. Similar figures, in connection with motor truck lines, are set out in detail in Statement, Index No. 43.

(B-243) (Corrected)s.

Nashville, Tenn. February 9, 1931.

[fol. 52] EXHIBIT No. 3 TO ORIGINAL BILL

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 23400

Exhibit —. Witness: Barham. Reporter: ——. Date: March —, 1931

Index No. 49

A comparison of property and privilege taxes paid in 1929 by the Railroads operating in 33 Tennessee Counties named, with the Amount of Taxes paid in the same counties by all motor carriers competing with Railroad carriers (gasoline tax not included).

As this exhibit shows, the total ad valorem property taxes paid by all busses and trucks competing with railroads in these 33 Tennessee Counties, in 1929, was $644.00 of which $420.00 was paid in Grundy County, all by the N., C. & St. L. which at that time operated two busses and two trucks in that County.

Registration tags are required purchased by motor vehicles, both private and public, and this item accounts for more than one-third of all the taxes paid by motor trucks and busses, excluding gasoline, the tax on which is also paid by all motorists and gasoline used industrially.

The discrepancy in the division of privilege taxes between the Counties and State on busses and trucks is explained by a provision of law which forbids county assessments for this purpose on busses, the State tax privilege being inclusive.

(Here follows statement, side folios 52½ and 53)

[fol. 52½]

| County | Privilege | | | | | |
|---|---|---|---|---|---|---|
| | Bus | | Truck | | Terminal | |
| | County | State | County | State | County | State |
| Bedford | | | $137.50 | $137.50 | | |
| Benton | | | | | | |
| Bledsoe | | | 22.50 | 30.00 | | |
| Carroll | | | 25.00 | 55.00 | | |
| Cheatham | | 150.00 | 250.00 | 313.75 | | |
| Coffee | | 125.00 | 75.00 | 75.00 | | |
| Davidson | 232.50 | 22,738.75 | 1,536.25 | 1,501.25 | 87.50 | 327.50 |
| Decatur | | | | 11.25 | | |
| Dickson | | 911.25 | 337.50 | 337.50 | | 62.50 |
| Fayette | | | 12.50 | 12.50 | | |
| Franklin | 138.75 | 138.75 | 175.00 | 175.00 | | |
| Grundy c | | 1,000.00 | | 50.00 | | |
| Hamilton | | 4,418.13 | 487.50 | 706.75 | | 75.00 |
| Hardeman | | | | | | |
| Haywood | | | 20.00 | 20.00 | | |
| Henderson | 6.25 | 6.25 | 37.50 | 37.50 | | |
| Henry | | 62.50 | | | | |
| Hickman | | 100.00 | 87.50 | 158.75 | | |
| Humphreys | | | | 251.50 | | |
| Lewis | | | 11.25 | 50.00 | | |
| [fol. 53] | | | | | | |
| Lincoln | 24.40 | 61.25 | 137.50 | 275.00 | | |
| Madison | | 1,800.00 | 152.50 | 152.50 | 12.50 | 37.50 |
| Marion | | 764.50 | 35.00 | 35.00 | | |
| Marshall | 45.00 | 45.00 | 470.00 | 477.50 | | |
| Maury | 270.00 | 270.00 | 462.50 | 462.50 | | 25.00 |
| Obion | 12.50 | 37.50 | 250.00 | 253.75 | | |
| Rutherford | | 825.00 | 625.00 | 1,537.50 | 231.00 | 30.00 |
| Sequatchie | | | 12.50 | 12.50 | | |
| Shelby | | 2,000.00 | 250.00 | 250.00 | 150.00 | 250.00 |
| Warren | | | | 33.75 | | |
| Weakley | | 300.00 | 52.50 | 52.50 | | |
| White | | 12.50 | 12.50 | 27.50 | | |
| Wilson | 6.25 | 806.25 | | 425.35 | | |
| Total | $735.65 | $36,572.63 | $5,675.00 | $7,918.60 | $481.00 | $807.50 |

a—Estimated.
b—Special Tax.
c—All motor tax payments in Grundy County were made by the N. C. & S
account of 2 busses and 2 trucks on short runs represents 5.25% of all paymen
NOTE.—The above figures do not include municipal taxes or taxes in speci
During 1929 the N. C. & St. L. paid municipal taxes in these counties amoun
If we may assume that approximately the same proportion obtains with other
in municipal taxes for 1929.
While no check was made of municipal taxes paid by motor carriers for hi
lected indicates that the total of such taxes was not greater than the amount
(B—221)s.
Nashville, Tenn.
January 27, 1931.

| Terminal | | Ad Valorem Property Tax | | Registration Tags | | Total | | Railroads | |
|---|---|---|---|---|---|---|---|---|---|
| unty | State | County | State | County | State | County | State | County | State |
| ... | ... | ... | ... | ... | $557.53 | $137.50 | $695.03 | $16,223.84 | $2,032 |
| ... | ... | ... | ... | ... | ... | ... | ... | 17,472.22 | 1,941 |
| ... | ... | ... | ... | ... | 207.50 | 22.50 | 237.50 | 3,309.32 | 380 |
| ... | ... | ... | ... | ... | 359.08 | 25.00 | 414.08 | 44,798.60 | 4,329 |
| ... | ... | ... | ... | ... | 404.09 | 250.00 | 867.84 | 6,289.15 | 833 |
| ... | ... | ... | ... | ... | 358.69 | 75.00 | 558.69 | 12,383.65 | 1,314 |
| 87.50 | 327.50 | ... | ... | ... | 4,384.21 | 1,856.25 | 28,951.71 | 66,142.74 | 13,860 |
| ... | ... | ... | ... | ... | 212.76 | ... | 224.01 | 2,588.17 | 230 |
| ... | 62.50 | ... | 171.00 | ... | 1,162.85 | 337.50 | 2,645.10 | 26,949.18 | 2,544 |
| ... | ... | ... | ... | ... | 27.02 | 12.50 | 39.52 | 41,927.72 | 4,023 |
| ... | ... | ... | ... | ... | a800.00 | 313.75 | 1,113.75 | 35,606.70 | 4,391 |
| ... | ... | 390.00 | 30.00 | ... | 305.00 | 390.00 | 1,385.00 | 10,567.26 | 813 |
| ... | 75.00 | 46.20 | 7.00 | ... | 3,661.44 | 533.70 | 8,868.32 | 138,776.84 | 20,320 |
| ... | ... | ... | ... | ... | ... | ... | ... | 62,079.01 | 6,745 |
| ... | ... | ... | ... | ... | 118.17 | 20.00 | 138.17 | 17,271.21 | 2,314 |
| ... | ... | ... | ... | ... | 148.99 | 43.75 | 192.74 | 18,999.84 | 1,435 |
| ... | ... | ... | ... | ... | 20.25 | ... | 82.75 | 38,094.26 | 4,008 |
| ... | ... | ... | ... | ... | 520.61 | 87.50 | 779.36 | 12,148.22 | 1,038 |
| ... | ... | ... | ... | ... | 636.55 | ... | 888.05 | 23,180.15 | 1,915 |
| ... | ... | ... | ... | ... | 54.17 | 11.25 | 104.17 | 9,191.82 | 902 |
| ... | ... | ... | ... | ... | 695.44 | 161.90 | 1,031.69 | 8,826.46 | 1,594 |
| 12.50 | 37.50 | ... | ... | ... | 683.76 | 165.00 | 2,673.76 | 72,672.07 | 8,809 |
| ... | ... | ... | ... | ... | 99.39 | 35.00 | 898.89 | 22,819.35 | 2,330 |
| ... | ... | ... | ... | ... | 628.93 | 515.00 | 1,151.43 | 29,917.39 | 3,471 |
| ... | 25.00 | ... | ... | ... | 1,388.97 | 732.50 | 2,146.47 | 36,471.28 | 5,405 |
| ... | ... | ... | ... | ... | 494.80 | 262.50 | 786.05 | 67,568.06 | 9,178 |
| 31.00 | 30.00 | ... | ... | ... | 3,389.69 | 856.00 | 5,782.19 | 27,681.31 | 3,542 |
| ... | ... | ... | ... | ... | 160.88 | 12.50 | 173.38 | 3,139.73 | 369 |
| 50.00 | 250.00 | ... | ... | ... | 4,068.61 | 400.00 | 6,568.61 | 190,784.89 | 39,916 |
| ... | ... | ... | ... | b100.00 | 358.93 | 100.00 | 392.68 | 7,056.69 | 789 |
| ... | ... | ... | ... | ... | 319.51 | 52.50 | 672.01 | 37,799.78 | 4,658 |
| ... | ... | ... | ... | ... | 31.85 | 12.50 | 71.85 | 9,168.78 | 1,079 |
| ... | ... | ... | ... | ... | 1,366.49 | 6.25 | 2,598.09 | 6,838.21 | 1,120 |
| 81.00 | $807.50 | $436.20 | $208.00 | $100.00 | $27,626.16 | $7,427.85 | $73,132.89 | $1,124,743.90 | $157,622 |

by the N. C. & St. L. Motor Transit Co., a subsidiary of the N. C. & St. L. Railway. This payment on % of all payments made for county purposes, and 1.9% of all taxes paid for state purposes.
or taxes in special school drainage or improvement districts for either railroads or motor carriers for hire.
counties amounting to $105,911, this sum being 24.9 per cent of the $425,360 paid for county purposes.
tains with other railroads, it would appear that all railroads operating in these 33 counties paid $280,061

or carriers for hire, examination of the laws and ordinances under which such taxes could have been col-
an the amount paid as county taxes, viz: $7,427.85.

[fol. 54] IN CHANCERY COURT OF DAVIDSON COUNTY

SUBPŒNA TO ANSWER—Issued September 29, 1931

State of Tennessee to the Sheriff of Davidson County, Greeting:

We command you to summon Roy C. Wallace, Comptroller of the State of Tennessee; Chas. M. McCabe, Commissioner of Finance and Taxation of the State of Tennessee; L. D. Smith, Attorney General of the State of Tennessee, if to be found in your County, to appear before the Chancellor of Part One of our Chancery Court at Nashville, on the first Monday in October 1931, it being the 5th day of October 1931, there and then to answer the Original Bill of Complaint of Nashville, Chattanooga & St. Louis Railway vs. Roy C. Wallace, Comptroller etc. and others, and further do and receive what our said Court shall consider in that behalf; and this you shall in no wise omit, under the penalty prescribed by law. Herein fail not, and have you then and there this writ.

Witness Joseph R. West, Clerk and Master of our said Chancery Court at Office, in the Court house at the City of Nashville, Tennessee, this first Monday in April 1931 and the 155th year of American Independence.

Joseph R. West, Clerk and Master, by C. H. Swann, D. C. & M.

Sheriff's Return

Executed by reading the within process to L. D. Smith, Attorney General, who accepted service for all the within named defendants, and left with him a copy of this subpœna and a copy of the bill filed in this cause.

Sam J. Shryer, Sheriff, by F. J. Lawrence, D. S.

This Sept. 29, 1931.

---

[fol. 55] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO AMEND BILL OF COMPLAINT—Nov. 11, 1931

In this cause, upon application of the complainant, it was ordered by the Court that complainant be and is hereby permitted to amend its original bill filed herein, as follows:

1. By rewriting all of Section III, on page 2 of the original bill so that as rewritten it will read as follows:

"III

This is a suit under Chapter 29 of the 1923 Public Acts of Tennessee officially cited as the 'Uniform Declaratory Judgments Act' to determine to what extent, if any, complainant is subject to the various provisions of Chapter 58 of the 1923 Acts of Tennessee and the amendments thereof; and also to construe said series of statutes to determine whether they require a railroad, such as complainant, to obtain a permit, or to make any bond or bonds, or to pay any tax on any gasoline used in railroad operations in Tennessee or elsewhere; and to determine the constitutional validity of said statutes if they be construed as [fol. 56] applicable to such a railroad as complainant under the facts hereinafter stated.

Complainant's rights and obligations under said statutes are now actually in issue as will be hereinafter more fully set forth."

2. By striking entirely from the original bill Section XII thereof at the top of page 12.

3. By changing on page 12 of the original bill Section "XIII" to Section "XII."

4. By striking out on page 12 the second paragraph of the prayer, reading as follows:

"Complainant prays that the Court find that it does not owe the sum of money claimed by respondents or any sum as a privilege tax under said statutes,"

and insert in lieu thereof the following:

"Complainant prays that the Court determine and declare whether it is obligated to obtain any permit or make any bond or comply with any of the other administrative provisions of said series of statutes; and further that the Court determine and declare whether gasoline temporarily stored in complainant's shops at Nashville, Tennessee, both that actually used and consumed in railroad operations in Tennessee and that actually used and consumed in railroad operations in the States of Kentucky, Alabama and Georgia,

comes within the purview of any of the administrative or other provisions of this series of statutes."

[fol. 57] It is further ordered by the Court that copy of these amendments be spread upon the minutes.

---

[fol. 58] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

DEMURRER OF DEFENDANTS—Filed November 11, 1931

Come the defendants, Roy C. Wallace, Chas. M. McCabe, and L. D. Smith, Comptroller of the Treasury, Comissioner of Finance and Taxation and Attorney General of the State of Tennessee, respectively, and move the Court to dismiss complainant's bill as amended on demurrer and as grounds for said demurrer assign the following:

I

Because under the facts as alleged in the bill filed against them in this cause, the sole and exclusive remedy, if any, available to complainant, is first, to pay the tax in question under protest and thereupon seasonably to institute suit in the proper court to recover the sum so paid, and this Honorable Court is therefore without jurisdiction in this case.

II

Under the facts set forth in complainant's bill, the com-[fol. 59] plainant is entitled to no adjudication construing the statutes in question or declaring its status, rights, obligations or liabilities thereunder, because under the law, the sole and exclusive remedy provided is for the complainant to pay the tax in question under protest and then seasonably sue in the proper court to recover same, and such procedure would afford the complainant such full, complete and adequate relief as it is entitled to under the facts and under the law, and would necessarily require of the Court a construction of the statutes involved and a declaration of the complainant's rights and status thereunder.

III

As a matter of law, the complainant is entitled to no relief under Chapter 29, Public Acts of 1923, known as the "Uniform Declaratory Judgments Act" until the tax in question has first been paid under protest and suit has been seasonably brought in the proper court to recover the same. In other words, until the tax in question has been paid, the complainant has suffered no injury and is not entitled to invoke the protection of the Court.

IV

Chapter 29, Public Acts of 1923 has no application to the state of facts set up in complainant's bill, because the only procedure provided in such cases is for the taxpayer to pay the challenged tax under protest and then bring suit in the proper court to recover the same, where all of the taxpayer's [fol. 60] rights can be adjudicated and fully protected, and this Honorable Court is therefore without jurisdiction in this case.

V

Under the law, the complainant as a taxpayer is not entitled to resort to the courts for a declaration of its rights and status and thereby hinder, hamper and delay these demurrants as officials of the State in the discharge of their official and legal duty to collect promptly the tax in question as and when due, since the statute requires the payment of the tax in order to entitle the taxpayer to question its validity or the validity of the statute imposing the same.

VI

Because under the allegations of the bill, no such state of facts is presented as would entitle the complainant to any protection or exemption under the "Commerce Clause" of the Federal Constitution. It is alleged that the gasoline is purchased outside the State and shipped to complainant's warehouse or storehouse in Nashville, Tennessee, and there stored in quantities sufficient for at least thirty days' use and that it is distributed over the complainant's railroad system as and when needed, and that approximately sixty (60%) per cent of same is consumed in Tennessee and forty

(40%) per cent in Kentucky, Alabama and Georgia. This method of handling the gasoline in question does not, as a [fol. 61] matter of law, entitle the complainant to escape payment of the tax complained of under the Commerce Clause of the Federal Constitution, nor does the imposition of the tax constitute such a burden on interstate commerce as would afford the complainant any legal grounds for relief.

VII

Under the allegations of the bill, the tax complained of is a privilege tax laid on the sale, storage and/or distribution of gasoline and is laid alike on all those who sell, store or distribute the same, and since the complainant falls within the class taxed by the act—that is, the complainant under the allegations of the bill is a storer and/or a distributor—and is not discriminated against, the complainant cannot be heard to complain in this case.

VIII

Because under the allegations of the bill, the complainant stores gasoline in the State of Tennessee within the purview of the statutes and the tax in question is laid on the storage of gasoline and the complainant is therefore liable for the same.

IX

Because under the allegations of the bill, the complainant distributes gasoline in the State of Tennessee within the purview of the statutes and the tax in question is laid on [fol. 62] the distribution of gasoline and the complainant is therefore liable for the same.

X

Because, the fact, if it be a fact as alleged in the bill, that the complainant pays total taxes of all kinds and character to the State and to its political subdivisions grossly in excess of those paid by motor vehicle carriers, does not invalidate the tax in question as applied to the complainant, because under the allegations of the bill, the tax in question is a privilege tax laid on the privilege which the complainant enjoys of exercising certain privileges in the state, namely; the privilege of storing and/or distributing

gasoline, and being a privilege tax must only be equal, uniform and applied to all alike within the class taxed. Complainant therefore cannot complain that as regards the total tax aggregate which it pays to the State and its various subdivisions, said total is excessive as compared with its competitor motor vehicle carriers.

XI

Because the ultimate use to which the gasoline purchased by the complainant and shipped into Tennessee is put, cannot and does not determine the right of the State to tax the same or to tax the privilege of handling the same, because the criterion by which the right of the State is to be judged [fol. 63] is not the intention of the purchaser but the status of the property at the time of the transaction or when the state undertakes to impose the tax.

Wherefore Defendants move the Court to sustain the foregoing demurrer and dismiss complainant's bill.

L. D. Smith, Attorney General. Roy H. Beeler, Solicitor General.

---

[fol. 64] In Chancery Court of Davidson County

Nashville, Chattanooga & St. Louis Ry.

vs.

Roy C. Wallace, Comptroller, et al.

Decree of November 11, 1931

Be it remembered that this cause came on to be, and was, this day heard before Chancellor R. B. C. Howell, upon the original bill as amended and the demurrer of the defendants, Roy C. Wallace, Charles M. McCabe and L. D. Smith, in their official capacities, and after argument of counsel and due consideration thereof, the Chancellor was of opinion that grounds one to five inclusive of the demurrer are not well taken and are accordingly disallowed and overruled. The Chancellor was of opinion that grounds six to eleven inclusive of the demurrer are all well taken and each and every one of them are accordingly sustained.

It was therefore ordered, adjudged and decreed by the Court that the bill as amended be and the same is hereby dismissed, and that the defendants have and recover of the Nashville, Chattanooga & St. Louis Railway and of its sureties on its cost bond, Fitzgerald Hall and Seth M. Walker, all costs of this cause, for which execution may issue.

To the foregoing action of the Court in sustaining grounds six to eleven inclusive of said demurrer, and to [fol. 65] the action of the Court in sustaining each one of said grounds to the demurrer, complainant, Nashville, Chattanooga and St. Louis Railway excepted and prayed an appeal therefrom to the present term of the Supreme Court of Tennessee, sitting at Nashville, which appeal is by the Chancellor granted upon condition that complainant execute and file with the Clerk and Master a good and solvent appeal bond in the penal sum of $250.00 conditioned as prescribed by law in such cases, within thirty days from the entry of this decree.

To the action of the Chancellor in overruling grounds one to five inclusive of said demurrer, and to the action of the Court in not sustaining each and every one of said grounds one to five, inclusive, defendants excepted and prayed an appeal therefrom to the present term of the Supreme Court, which appeal is granted without the necessity of executing an appeal bond, as is provided by law in such cases.

Approved for entry.

Fitzgerald Hall, Roy H. Beeler.

---

[fols. 66 & 67] Bond on appeal for $250.00, approved and filed November 11, 1931, omitted in printing.

---

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 21, 1932

To the Clerk of the Supreme Court of the State of Tennessee:

You are hereby requested by appellant, The Nashville, Chattanooga & St. Louis Railway, to incorporate in the transcript of record in the above styled case to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause upon petition of The Nashville, Chattanooga & St. Louis Railway, the following:

1. Petition for appeal with endorsement thereon.
2. Assignment of errors accompan-ing petition for appeal.
3. Appeal bond with endorsement thereon.
4. Order allowing appeal.
5. Citation with acknowledgment of service thereon.
6. Assignment of errors filed by appellant, The Nashville, Chattanooga & St. Louis Railway in the Supreme Court of Tennessee.
7. Opinion of the Supreme Court of Tennessee dated April 30, 1932.
8. Petition filed by appellant, The Nashville, Chattanooga & St. Louis Railway on May 4, 1932 for a re-hearing in the Supreme Court of Tennessee.
9. Opinion of the Supreme Court of Tennessee dated June 4, 1932.

[fol. 70] 10. Final order in this cause in the Supreme Court of Tennessee.

11. Transcript of record.
12. This præcipe.
13. The Clerk's certificate.

The Nashville, Chattanooga & St. Louis Railway, by Fitzgerald Hall, Vice-President & General Counsel.

I, Roy H. Beeler, counsel for appellees and Solicitor General of the State of Tennessee, acknowledge service of

this præcipe on this June 21st, 1932. I agree that it embraces all that need be transmitted from the Supreme Court of the State of Tennessee to the Supreme Court of the United States in this cause.

Roy H. Beeler, Counsel for Appellees and Solicitor General of the State of Tennessee.

---

[fol. 71] Clerk's certificate to foregoing transcript omitted in printing.

---

[fol. 72] Judge's certificate to clerk omitted in printing.

---

[fol. 73] Clerk's certificate to judge omitted in printing.

---

[fol. 74] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 24, 1932

Comes now The Nashville, Chattanooga & St. Louis Railway, appellant in the above styled cause, conformably to Rule 13 of this Honorable Court, and adopts its assignment of errors as its statement of the points to be relied upon.

And The Nashville, Chattanooga & St. Louis Railway, appellant, further states that all the record as filed in this cause should be printed, including this statement.

The Nashville, Chattanooga & St. Louis Railway, by Fitzgerald Hall, Vice-President & General Counsel.

I, Roy H. Beeler, counsel for appellees in this cause and Solicitor General of the State of Tennessee, acknowledge service of the above on this the 21st day of June, 1932, and I concur in the suggestion that the entire record be printed for consideration in the Supreme Court of the United States.

Roy H. Beeler, Counsel for Appellees and Solicitor General of the State of Tennessee.

[fol. 75] [File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

---

Endorsed on cover: File No. 36,873. Tennessee, Supreme Court. Term No. 176. The Nashville, Chattanooga & St. Louis Railway, appellant, vs. Roy C. Wallace, Comptroller of the Treasury of the State of Tennessee, et al., etc. Filed June 24, 1932. File No. 36,873.

FILE COPY

Office Supreme Court, U.
FILED
JUL 15 1932
CLERK

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1932.**

---

**Term Number 176**

---

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

*Versus*

ROY C. WALLACE, COMPTROLLER, ET AL.,

APPELLEES.

---

## ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

---

## STATEMENT BY APPELLANT TO COMPLY WITH RULE TWELVE OF THE SUPREME COURT OF THE UNITED STATES.

---

FITZGERALD HALL,
*Counsel for Appellant.*

SETH M. WALKER,
FRANK SLEMONS,
WALTON WHITWELL,
W. A. MILLER,
*Of Counsel.*

July 20, 1932.

**(File No. 36,873.)**

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1932.**

---

**Term Number 176**

---

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

*Versus*

ROY C. WALLACE, COMPTROLLER, ET AL.,

APPELLEES.

---

**ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.**

---

**STATEMENT BY APPELLANT TO COMPLY WITH RULE TWELVE OF THE SUPREME COURT OF THE UNITED STATES.**

---

MAY IT PLEASE THE COURT:

Chapter 58 of the 1923 Acts of Tennessee undertook to finance "the construction and maintenance of a highway system in the State" by "requiring all . . . . corporations *engaged in or carrying on*

*the business*[1] in this State of *selling* gasoline. . . ." to pay a *privilege tax* for the doing of such gasoline business. (R., 30-31)[2]

Chapter 67 of the 1925 Acts of Tennessee amended said Act of 1923 so as to embrace those "engaged in or carrying on the business" not only of selling but also of "*storing or distributing*" gasoline. (R., 31-32)

Appellant Railway was chartered as a common carrier by railroad and may not engage and does not engage in any other business—specifically it is not in the gasoline business. (R., 28, 33-34)

The State of Tennessee undertook to collect from appellant Railway taxes under the 1923 and 1925 Acts just mentioned on the theory that because it bought (outside of Tennessee) gasoline, kept it a few days on its premises awaiting consumption by it in normal railroad operation, it was "engaged in or carrying on" the gasoline business. (R., 30)

Thereupon appellant Railway filed a bill in the chancery court of Davidson County, Tennessee, to have said Acts construed and, if held applicable to it, their validity under the Federal Constitution determined. (R., 26-47)

The bill specifically alleged that the Railway was chartered to engage only in the business of operat-

---

[1]All italics ours.

[2]Record references are to original record filed in this Court before printing.

ing a railroad—and in fact was engaged and could engage in no other; that it bought gasoline outside Tennessee which was delivered to it at its Nashville shops in quantities for some thirty days' use and that all of it was used promptly exclusively on the Railway's own property (as distinguished from the use of public roads) in the normal operation of its interstate railroad, over forty per cent being used in states other than Tennessee; that it was no more "engaged in or carrying on" the gasoline business than it was engaged in the tie, lumber, coal, steel, water or other business; that the tax in question was not a property tax, nor a tax on sales or use, nor involved the exercise of the police power, *but was a tax for the privilege of engaging in a business in which it did not and could not legally engage;* and, finally, that to attempt to segregate the infinite number of activities making up interstate commerce by railroad and denominate the doing of each the "carrying on" of a separate and distinct business and impose a separate and distinct privilege tax thereon was a direct and illegal burden on interstate commerce; and that, if the tax could be construed to be on the use (it was held otherwise), then to tax the use of fuel in interstate railroad operation (as distinguished from use by a "local enterprise" or the use of the public highways) was likewise an illegal burden on interstate commerce. (R., 33-37)

The bill further set out Tennessee's tax system (of which the Acts in question are an integral

part) applicable to railroads and its tax system applicable to their competitors, common carriers by motor vehicle on the public roads; and showed in detail that the actual application of the two systems operated to burden railroads some four hundred per cent more, considering all elements, than competing common carriers by bus and truck, thus not only directly burdening interstate commerce by railroad but violating the "due process" and "equality" clauses of the fourteenth amendment to the Federal Constitution. (R., 37-44)

A demurrer was filed, sustained, and the bill dismissed. (R., 58-65) On account of the constitutional questions involved the case was appealed directly to the Supreme Court of Tennessee. (R., 65)

The assignment of errors in the Supreme Court of Tennessee specifically challenged, as did the original bill above referred to, the validity of these state statutes under the "commerce," "due process," and "equality" clauses of the Federal Constitution. (R., 14-15) The Supreme Court in its original opinion of April 30, 1932, affirmed the lower court, basing its decision exclusively on the recent case of American Airways, Inc. v. Roy C. Wallace, Comptroller, 57 Fed. (2d), 877, (R., 16-17), which court said in part:

> "The statute in question does not impose a property tax upon the gasoline, but it imposes an 'excise' or 'privilege' tax upon the business

of storing and withdrawing the gasoline and the amount is computed upon withdrawals.

. . . .

"The Tennessee statute imposes an excise or privilege tax upon the business of storing and distributing gasoline, and this tax accrues whether the gasoline is used in interstate commerce or otherwise. . . . .

"It is simply a privilege tax upon engaging in a business within the state, and applies to all persons, firms or corporations doing a like business."

On May 4, 1932, appellant Railway filed a petition for a rehearing, on two grounds; first, that the court had not passed at all upon the discrimination claimed between Tennessee's taxing system of common carriers by railroad and common carriers by bus and truck, a question which had not been raised, discussed, considered or decided in said *American Airways, Inc.* v. *Roy C. Wallace, supra;* second, that the court had not specifically decided whether the challenged tax applied only to gasoline *used in Tennessee* or also to that *used in other states.* (R., 19-22)

The petition to rehear was denied on June 4, 1932, the court holding that the proposed tax applied on all gasoline used by the Railway in all states if it passed through its Nashville, Tennessee, shops, and disposed of the other constitutional questions by simply saying:

"The tax imposed upon those storing gasoline applies to all alike. The statutes made no

discrimination and it does not therefore contravene the provisions of the Fourteenth Amendment." (R., 24)

So all the federal questions presented to the Supreme Court of Tennessee were decided against appellant; the State statutes under attack were held valid; and a final judgment rendered against the Railway on June 4, 1932. (R., 25)

## I

The judgment now sought to be reversed was a final one by the highest court of the State of Tennessee. The validity of the Tennessee statutes involved was directly challenged both in the lower court and in the Supreme Court of Tennessee on the ground that they violated the "commerce," "due process," and "equality" clauses of the Federal Constitution. (R., 14-15, 39-44) These constitutional questions were all decided by the Supreme Court of Tennessee against appellant's contentions, and said statutes were held valid. (R., 16-17, 23-24)

The jurisdiction of this Court is claimed under section 237(a) of the Judicial Code as amended by the Act of February 13, 1925.

The following cases sustain the right to review, formerly by writ of error, now (since the Act of January 31, 1928, as amended by the Act of April 26, 1928) by appeal:

*Western & Atlantic Railroad* v. *Henderson*, 279 U. S., 639.
*Nashville, Chattanooga & St. L. Ry.* v. *White*, 278 U. S. 456.
*Sultan Railway & Timber Co.* v. *Department of Labor*, 277 U. S., 135.

## II

The final decision of the Tennessee Supreme Court was rendered and final judgment entered June 4, 1932. (R., 25) The Chief Justice of the Tennessee Supreme Court allowed the appeal and approved and signed all necessary orders and papers on June 21, 1932. (R., 4-13) The case was docketed in this Court on June 24, 1932.

## III

The Tennessee statutes under attack, as construed by the Supreme Court of Tennessee, impose upon appellant Railway a tax on the theory that said Railway is "engaged in or carrying on the business in this State of selling or storing or distributing gasoline. . . . . ."

The tax in question is not a property tax—it is not a tax on sales—it is not a tax on the use or consumption of property—it is not an inspection fee—it does not involve an exercise of the police power. It is, purely and simply, a tax imposed on persons, firms, and corporations for the privilege

of doing in Tennessee a gasoline business. *Foster & Creighton Co.* v. *Graham*, 154 Tenn., 412; *American Airways, Inc.*, v. *Wallace*, 57 Fed. (2d), 877, 880-882.

The questions involved are entirely different from those considered by this Court in *Eastern Air Transport, Inc.*, v. *South Carolina Tax Commission*, 285 U. S. 147. In that case the tax sustained was on a sale made within the State of South Carolina by an oil company (which did not complain) to the Eastern Air Transport, Inc., which later used the gasoline involved in interstate commerce. *Here the tax is neither on the sale nor on the use*, but on the doing of a business which appellant does not, and cannot legally, do.

It differs from *East Ohio Gas Company* v. *Tax Commission of Ohio*, 283 U. S., 465, in that the tax there involved was for the privilege of carrying on a specified intrastate business *which the taxpayer was doing*. Here the only business appellant Railway carries on, and may legally carry on under its charter, is the operation of an interstate railroad.

*Gregg Dyeing Co.* v. *Query*, 52 Sup. Ct., 631, 285 U. S., ——, is entirely different in that the South Carolina statute there under attack applied only to gasoline actually used within the State in "local enterprises"; this court saying: *"There is an exception in the case of a tax directly on use in inter-*

*state transportation*"; whereas the Tennessee Acts in question are construed to apply to gasoline not only actually used in other States but also to gasoline used in interstate railroad operation.

The original bill in the trial court and the assignment of errors in the Supreme Court of Tennessee specifically challenged the validity of these Tennessee statutes on the ground that they violated the "commerce clause" of the Federal Constitution. (R., 43) The Supreme Court of Tennessee held otherwise. (R., 16-17) We find no case involving exactly this narrow question, though the principles announced in *Helson & Randolph* v. *Kentucky*, 279 U. S., 245, seem more nearly applicable than those enumerated in any other case.

The original bill in the trial court and the assignment of errors in the Supreme Court of Tennessee raised another and wholly different question, namely, that Tennessee's system of taxing railroads was, considering all elements, so disproportionate to the system in effect applicable to common carriers by bus and truck as to render the statutes under attack invalid under the "due process" and "equality" clauses of the Fourteenth Amendment. (R., 39-44) The Supreme Court of Tennessee decided against appellant on this proposition, with practically no comment, (R., 24), apparently on the theory that any such question of discrimination must be limited to the "four corners" of the statutes under attack rather

than to the tax system as a whole. This court held otherwise in *Gregg Dyeing Co.* v. *Query*, 52 Sup. Ct., 631, 634, 285 U. S. ——.

So far as we can find, this important question has not been before this court.

## IV

These constitutional questions were specifically raised in the original bill below as the basis for the alleged invalidity of the State acts under attack, and were overruled by the trial court. (R., 39-44, 64-65) They were raised in the Supreme Court of Tennessee and overruled by that court. (R., 14-17, 23-24) They have been again raised by proper assignment of errors in this Court. (R., 5-8)

So far as jurisdiction and practice are concerned the case certainly seems to be properly here.

*Whitney* v. *California*, 274 U. S., 357, 360.
*Fiske* v. *Kansas*, 274 U. S., 380, 385.
*Mellon* v. *O'Neil*, 275 U. S., 212.
*Silver* v. *Silver*, 280 U. S., 117.
*Klein* v. *Board of Tax Supervisors of Jefferson County, Kentucky*, 282 U. S., 19.

It is respectfully submitted that this Court has jurisdiction of this cause on appeal.

The questions involved are new and of vast practical importance. A brief discussing these questions on their merits will be filed later.

A copy of this statement has been served upon adversary counsel and proof of such service filed with the Clerk of this Court.

Respectfully submitted,

Fitzgerald Hall

*Counsel for Appellant.*

July 20, 1932.

SETH M. WALKER,
FRANK SLEMONS,
WALTON WHITWELL,
W. A. MILLER,
*Of Counsel.*

FILE COPY

FILED
SEP 26 193
CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
APPELLANT,

*Versus*

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

## BRIEF ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

FITZGERALD HALL,
*Counsel for appellant.*

W. A. MILLER,
S. M. WALKER,
FRANK SLEMONS,
WALTON WHITWELL,
*of Counsel.*

September 30, 1932.

(File No. 36,873)

# INDEX.


| | PAGE |
|---|---|
| Preliminary statement | 1-4 |
| Federal questions involved | 2-4 |
| Jurisdiction | 5 |
| Statement of the case | 6-14 |
| Original bill | 6-13 |
| Demurrer | 13 |
| Opinions of Supreme Court of Tennessee | 13-14 |

Specification of errors:

I. A state cannot under the commerce and due process clauses impose upon a railroad a tax for the privilege of doing a business which said railroad neither does in fact nor can do under its charter and the general law ---------- 15

II. A state cannot under the commerce and due process clauses segregate the use of materials, such as coal, water, steel and gasoline, essential to interstate railroad operation, so as to make the consumption of each a separate business on which can be imposed a separate privilege tax ---------- 15

III. To directly tax the use of a commodity, such as gasoline, essential to and consumed in interstate railroad operation violates the commerce clause of the Federal Constitution ---------- 16

IV. Tennessee cannot tax gasoline purchased outside of Tennessee and actually used in Alabama, Kentucky and Georgia merely because it passes through the Railway's shops at Nashville, Tennessee, for inspection as to quality and quantity ---------- 16

V. Tennessee cannot under the commerce clause or the Fourteenth Amendment charge the Railway the same amount per gallon for gasoline used on its own private property in railroad operation as it charges competing common carriers by motor vehicle for gasoline consumed on the public highways, all such funds going to the construction and maintenance of such public highways ---------- 16-17

VI. The relative "economic weight" of the aggregate tax burden on railroads in Tennessee is over four hundred per cent greater than on competing common carriers

PAGE

by motor vehicle, thus violating both the due process and equality clauses of the Fourteenth Amendment... 17

Argument ... 18-72

Preliminary statement ... 18-20

Summary of argument ... 20-23

I. The state statutes under attack impose an excise tax for the privilege of doing an intrastate gasoline business which appellant Railway neither does nor can legally do ... 23-30

II and III. A state cannot by any device constitutionally impose a direct burden on interstate commerce... 30-43

The burden imposed by the statutes under attack is not based either on use or sales in Tennessee, so that such cases as *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147, are irrelevant ... 35-36

*Eastern Air Transport, Inc.* v *South Carolina Tax Commission*, 285 U. S. 147... 36-37

*Gregg Dyeing Co.* v. *Query*, 52 S. Ct. 631, 286 U. S. 472 ... 37-39

*East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465 39-41

*Helson and Randolph* v. *Kentucky*, 279 U. S. 245, seems to control this case ... 41-43

IV. Gasoline purchased outside Tennessee, consumed in Kentucky, Alabama and Georgia, cannot be taxed by Tennessee merely because it passes through the Railway's storehouse at Nashville for inspection as to quality and quantity by the Railway's purchasing agent... 44-46

V. The financial burdens imposed by the statutes under attack are in fact charges by the State as compensation for the use of its highways, as distinguished from taxes proper, thus making the Railway pay for something it does not use ... 47

VI. The relative "economic weight" of the aggregate tax burden in Tennessee imposed on railroads is over four hundred per cent greater than that imposed on competing common carriers by motor vehicle... 52-72

Appendix:

Chapter 58, Acts of Tennessee of 1923... 73-81

Chapter 67, Acts of Tennessee of 1925... 82-83

## TABLE OF CASES CITED.

PAGE

*Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71..... 41, 46
*Alabama & Vicksburg Ry.* v. *Jackson & Eastern Ry.*, 271 U. S. 244, 250 ..... 30
*Alward* v. *Johnson*, 282 U. S. 509, 513-514..... 50
*American Airways, Inc.* v. *Roy C. Wallace, Comptroller*, 57 Fed. (2) 877 ..... 13, 25, 35
*Bank* v. *Senter*, 149 Tenn. 569..... 26
*Bekins Van Lines* v. *Riley*, 280 U. S. 80..... 50
*Boeing Air Transport* v. *Edelman*, 51 Fed. (2) 130..... 50
*Bowers, Executor*, v. *Lawyers Mortgage Co.*, 285 U. S. 182, 190 ..... 28
*Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647, 648..... 35
*Carley & Hamilton* v. *Snook*, 281 U. S. 66, 71..... 50
*Carson Petroleum Co.* v. *Vial*, 279 U. S. 95..... 45
*Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366..... 45
*Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 35..... 45
*Clark* v. *Poor*, 274 U. S. 554, 557..... 49
*Colorado* v. *United States*, 271 U. S. 153, 162-163..... 32
*Consolidated Southwestern Cases*, 185 I. C. C. 357, 361..... 70
*Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 52 S. Ct. 595, 599 ..... 50
*Co-ordination of Motor Transportation*, Docket No. 23400, 182 I. C. C. 263..... 70
*Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 297..... 34
*Crooks* v. *Harrelson*, 282 U. S. 55, 61..... 23
*Cumberland Coal Co.* v. *Board*, 284 U. S. 23..... 67
*Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290-292 ..... 45
*Dane* v. *Jackson*, 256 U. S. 589, 598-599..... 68
*Doty* v. *Telephone Co.*, 123 Tenn. 329, 338-339..... 25
*East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470..33, 34, 39
*Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147 ..... 35, 36
*First National Bank of Hartford* v. *Hartford*, 273 U. S. 548, 560 ..... 66
*Foster & Creighton* v. *Graham*, 154 Tenn. 412..... 18, 26

PAGE

*Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10..... 32
*Frost* v. *Railroad Commission*, 271 U. S. 583, 592..... 30
*Furst* v. *Brewster*, 282 U. S. 493, 497-498..... 40, 45
*Georgia Power Co.* v. *Decatur*, 281 U. S. 505, 508..... 29
*Goldsmith* v. *Prendergast Construction Co.*, 252 U. S. 12, 17.. 69
*Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 52 S. Ct. 631, 635 ..... 37, 61, 66, 71
*Hanover Fire Insurance Co.* v. *Eisman*, 45 Okla. 639, 146 Pacific 214, 218 ..... 27
*Hart Refineries* v. *Harmon*, 278 U. S. 499..... 41
*Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 257, 259..... 33, 69
*Helson & Randolph* v. *Kentucky*, 279 U. S. 245..... 41
*Hendrick* v. *Maryland*, 235 U. S. 610, 622-624..... 50
*Hill* v. *Whitice*, 149 Tenn. 168..... 26-27
*Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393, 403 ..... 60
*International Paper Co.* v. *Massachusetts*, 246 U. S. 135, 141-142 ..... 33
*International Shoe Co.* v. *Shartel*, 279 U. S. 429, 433..... 41
*Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 251..... 60, 71
*Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183..... 49
*Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 247 56, 67
*Kansas City Southern* v. *Road Improvement District*, 256 U. S. 658, 661 ..... 51
*Klein* v. *Board of Tax Supervisors*, 282 U. S. 19, 23..... 57
*Knapp* v. *Golden Cross*, 121 Tenn. 212, 231..... 24
*Lacoste et al.* v. *Department of Conservation*, 263 U. S. 545, 550 ..... 47
*Lawrence et al.* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 52 S. Ct. 556, 557-559..... 46-47, 57, 60, 64
*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50..... 45
*Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37-40 69
*McFadden et al.* v. *Alabama Great Southern*, 241 Fed. 562.. 45
*Memphis & Charleston Ry. Co.* v. *Pace*, 282 U. S. 241, 246... 68
*Michigan Public Utilities Com.* v. *Duke*, 266 U. S. 570, 576-578 ..... 30, 50
*Mid Continent Air Express* v. *Lujan*, 47 Fed. (2) 266..... 35
*Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307..... 31

PAGE

*Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478..... 51, 63
*New Jersey Telephone Co.* v. *Tax Board*, 280 U. S. 338, 346, 347 ..... 31, 49
*Norfolk & Western R. R.* v. *Pennsylvania*, 136 U. S. 114, 120 34
*Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159-160..... 40, 57
*Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 565-567..... 28, 41
*Pacific Company* v. *Johnson*, 285 U. S. 480, 493..... 66
*Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 222..... 32, 46
*Prouty* v. *Coyne*, 55 Fed. (2) 289, 292..... 41, 48
*Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 401..... 46
*Quicksafe Manufacturing Co.* v. *Graham*, 161 Tenn. 46..... 27
*Rafferty* v. *New Brunswick Fire Ins. Co.*, 3 Harrison (N. J.) 480, 38 American Decisions 525, 529..... 27
*Road Improvement District* v. *Missouri Pacific*, 274 U. S. 188, 194 ..... 51, 69
*St. Louis & Southwestern Ry.* v. *Nattin*, 277 U. S. 157..... 51
*Shelton* v. *Silverfield*, 104 Tenn. 67..... 30
*Smith* v. *Cahoon*, 283 U. S. 553, 567..... 28, 30
*Sprout* v. *South Bend*, 277 U. S. 163, 170-171..... 33, 46, 50
*Standard Pipe Line Co.* v. *Miller County Highway & Bridge District*, 277 U. S. 160..... 51
*State Tax Commission of Mississippi* v. *Interstate Natural Gas Co., Inc.*, 284 U. S. 41..... 40
*Texas Transport & Terminal Co.* v. *New Orleans*, 264 U. S. 150 ..... 32
*Thomas* v. *Kansas City Southern*, 261 U. S. 481, 483..... 51, 69
*Transcontinental & Western Air, Inc.* v. *Lujan*, 8 Pac. (2) 103 41
*Trentham* v. *Moore*, 111 Tenn. 346, 353..... 26
*Turner* v. *Eslick*, 146 Tenn. 236, 240, 246..... 25, 63
*Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 286..... 29
*United States Airways* v. *Shaw*, 43 Fed. (2) 148..... 35
*United States* v. *La Franca*, 282 U. S. 568, 572..... 47
*United States* v. *New York Central R. R. Co.* 272 U. S. 457, 464 ..... 35
*United States* v. *Sprague*, 282 U. S. 717, 731..... 23
*United States* v. *Standard Brewery*, 251 U. S. 210, 217..... 23
*Vanderbilt University* v. *Cheney*, 116 Tenn. 259, 267-269..... 26
*Western & Atlantic R. R.* v. *Henderson*, 279 U. S. 639, 642..... 27
*Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, 513..... 45

## TABLE OF STATUTES CITED.

PAGE

Tennessee Acts, 1845-1846, Chapter 1 ..... 24
Tennessee Acts, 1923, Chapter 21 ..... 26
Tennessee Acts, 1923, Chapter 58 ..... 1, 6, 7, 15, 23, 48
Tennessee Acts, 1925, Chapter 67 ..... 7, 24
United States Constitution, Commerce Clause ..... 10, 11, 15, 16, 20, 29
United States Constitution, Fourteenth Amendment ..... 11, 12, 13, 14, 15, 16, 17, 20, 23, 29, 30, 59, 62, 70

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1932

---

No. 176

---

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

*Versus*

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,

APPELLEES.

---

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

---

## BRIEF ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

---

MAY IT PLEASE THE COURT:

Tennessee, commencing with chapter 58 of its 1923 Acts, undertook to finance the construction and maintenance of its highway system through the medium of so-called* gasoline taxes, which the

*As we shall undertake to demonstrate later on (page 47 infra), the charges imposed by these statutes are not taxes proper, but compensation for the use of public highways. As these charges have been generally denominated "taxes," we shall generally do likewise.

Tennessee courts hold to be excise taxes for the privilege of doing a gasoline business, as seller, storer or distributor. (R., 14-16, 18-19)

Appellant Railway uses gasoline in the operation of its railroad throughout the four states in which it does business in such ways and for such purposes as to make an apportionment between that consumed exclusively in interstate commerce and that used solely in intrastate commerce impossible. (R., 16-18) Tennessee undertook to compel the Railway to pay taxes under these statutes *on all such gasoline regardless of where or how used*, so the Railway, pursuant to proper practice in Tennessee, filed a bill to have determined their application, meaning and validity. (R., 12-23)

The only questions here, of course, relate to the challenge to the validity of these state statutes under the Federal Constitution. The following questions arise on this record:

1. Has Tennessee the power to impose upon such an interstate common carrier by railroad as appellant a tax for the privilege of doing a business which it does not do and which under its charter and the laws of Tennessee it cannot legally do?

2. Has Tennessee the power to reduce "railroading" to its constituent elements and impose a

privilege tax on the doing of each—or, to put it another way, because a railroad necessarily uses coal, lumber, steel and gasoline, has a state the power to impose on such a railroad a tax for the privilege of engaging in the coal business, the lumber business, the steel business, or the gasoline business?

3. Has Tennessee the power, regardless of technicalities, definitions and phraseology, to impose a tax upon the use in interstate commerce by a common carrier by railroad of the various commodities consumed in interstate railroad operation, as for example, gasoline? If it cannot so tax the use, can it tax the necessary preliminary step of keeping a few days supply on hand under the fiction that the Railway is thereby a "storer" or "distributor"?

4. Has Tennessee the power to impose on a railroad a privilege tax or any other sort of tax on gasoline neither bought nor consumed within its borders but merely passing through its general storehouse in the State in the normal procurement of supplies for use over its entire system?

5. Can Tennessee impose, not a tax proper, but a charge for the use of the public highways based on the gallons of gasoline consumed; allocate all collections to the construction and maintenance of such highways; and make such charges applicable

to those who do not use the highways at all—or, to put it another way, can Tennessee make the Railway for the use of gasoline used in railroading on its own private property pay the same amount and for the same purpose as if it used such gasoline on the public highways?

6. Has Tennessee the power to enact one system of taxation for common carriers by railroad and another system for the taxation of common carriers by motor vehicle, so that considering the two systems as a whole the "economic weight" of the former will exceed that of the latter over four hundred per cent—or, to put it another way, while the methods of taxation may vary, must all common carriers bear, not exactly, to be sure, but approximately the same relative tax burden or may there be excessive favoritism of one agency of transportation over another?

All these questions were raised by the Railway's original bill in the trial court, to which appellees here filed a demurrer (R., 29) which was sustained and the case appealed directly to the Supreme Court of Tennessee, where the judgment of the trial court was affirmed (R., 8, 12). The Railway has appealed here, there being involved only the validity under the Federal Constitution of these state statutes. (R., 1-6)

## JURISDICTION

The Railway on July 20, 1932, filed a separate statement and brief on jurisdiction to comply with the then Rule 12 of this court.

## STATEMENT OF THE CASE

### The pleadings

Appellant Railway filed a bill in the chancery court of Davidson County at Nashville, Tennessee, to have that series of acts, commencing with Chapter 58 of the 1923 Acts of Tennessee, construed and their validity determined. (R., 12-23)

The original bill as amended made out the following case:

The Nashville, Chattanooga & St. Louis Railway was chartered for the sole purpose of operating a railroad, and is engaged solely in that business, both interstate and intrastate, in the states of Tennessee, Kentucky, Alabama and Georgia. (R., 13, 16) All of its tracks are through highways of interstate commerce and practically every train carries persons or property in interstate commerce. (R., 21) Said Railway engages in no other business—specifically it is not in the gasoline business either as seller, distributor or storer. (R., 16)

Tennesse undertook to finance, in large measure, its highway system by what is generally called a "gasoline tax," though a reading of these statutes demonstrates that the rationale thereof was that the users of the highways should pay *compensation* for the use thereof in proportion to the amount of

gasoline so consumed. (R., 15, 18-19) The first and principal one of these acts is chapter 58 of the 1923 Acts, the caption of which is as follows:

> "AN ACT requiring all persons, firms, associations, joint stock companies, syndicates and corporations *engaged in or carrying on the business in this State of selling gasoline** and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, *such fund to be used solely in the construction and maintenance of a highway system in the State.*"

This act has been amended several times but the principal one is chapter 67 of the 1925 Acts, the caption of which is as follows:

> "AN ACT to amend an Act entitled 'An Act requiring all persons, firms, associations, joint stock companies, syndicates and corporations *engaged in or carrying on the business in this State of selling gasoline* and distillate in this State, to pay to the State Comptroller a privilege tax for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, *such fund to be used solely in the construction and maintenance of a highway system in the State,*' being Chapter 58 of the Public Acts of 1923, so as to amend the caption by in-

*All italics in this brief are our own.

cluding the words, 'or storing or distributing' after the word 'selling' in the third line of the caption of the printed Act as published, and by amending the body of the Act by imposing the tax upon persons, firms, associations, joint stock companies, syndicates and corporations storing or distributing any of the products mentioned in said Act."

These two acts are set out in full in the appendix, *infra*, pages 73, 82.

The Railway buys, not in Tennessee, but elsewhere, gasoline in bulk quantities which is delivered in interstate commerce to its general storehouse at its Nashville shops for inspection by it "as to quality and quantity" (R., 16), thence used all over the system as the exigencies of operation require. (R., 16-18, 21) The average amount on hand at any one time is sufficient for about thirty days' use. *All of such gasoline is used in railroad operation exclusively on railroad property.* (R., 16)

The Railway buys some gasoline in Tennessee which is used in its automobiles on the public highways. The tax or charge in question on all such gasoline is paid and that is not involved in this case. (R., 18)

The Railway buys, handles and uses gasoline just as it does coal, ties, lumber, rail and other commodities essential to railroad operation. It is

no more in the gasoline business than it is in the coal or lumber or steel business. (R., 16)

*There is no sale of such gasoline within the State of Tennessee.* All of that gasoline here involved is purchased from producers outside the state and delivered in interstate shipments to the Railway's shops at Nashville, Tennessee, where there is kept on hand a quantity sufficient, as a rule, for approximately thirty days' use. None of this gasoline is ever sold in the state of Tennessee, nor is it ever used by anyone except the Railway, nor is it ever used on public property, nor is it ever used except in the actual operation of appellant's railroad. The Railway permits no others to use its storage facilities and distributes gasoline to no third parties. (R., 16-17)

This gasoline, as are supplies generally, is delivered to the Railway's storehouse in Nashville where it remains a few days awaiting actual consumption in the states of Tennessee, Kentucky, Alabama and Georgia in interstate railroad operation.

Approximately sixty per cent of such gasoline is consumed in Tennessee and the remaining forty per cent is actually used by the Railway in railroad operation in the states of Kentucky, Alabama and Georgia. (R., 16)

This gasoline is used in essential railroad work on tracks all of which are through highways of interstate commerce, over which run trains practically every one of which carries persons or property in interstate commerce. (R., 17-18, 21) It would not be possible to allocate the consumption as between interstate and intrastate commerce, as the several uses detailed in the bill demonstrate. (R., 16-18)

Railroads in Tennessee are subject to several species of taxes and their common carrier competitors by motor vehicle are likewise subject to several kinds of taxes. The two systems are not identical but, considering the two systems as a whole, the tax burden thereunder on such a railroad as appellant in Tennessee is over four hundred per cent greater than the tax burden of competing common carriers by motor vehicle. The facts showing such disproportionate "economic weight" between these two competing agencies of transportation are fully set out in the original bill and exhibits. (R., 20-22)

On this statement of facts the Railway in its original bill asked that these statutes be construed as non-applicable to the Railway; but, if applicable, that they be held invalid for the following reasons:

(a) Tennessee cannot consistently with the commerce and due process clauses of the Federal

Constitution make the Railway pay an excise tax for the privilege of doing a gasoline business which it neither does in fact nor can, under its charter, or the general law of Tennessee, legally do. Legislative fiat may not under the Fourteenth Amendment substitute fiction for fact. (R., 21-23)

(b) Tennessee cannot segregate the various activities jointly constituting "railroading" so as to require a railroad, such as appellant, to pay a privilege tax on the theory that it is engaged in the gasoline business, or coal business, or steel business, or lumber business, merely because it uses such commodities in operating its railroad. To do this would not only be arbitrary and capricious under the Fourteenth Amendment but an unconstitutional burden on interstate commerce. (R., 21-23)

(c) The gasoline in question is all consumed on the Railway's privately owned property in the operation of its interstate railroad. There is no sale of this gasoline in Tennessee. The Railway permits no others to buy or use it. The Railway stores for and distributes to no third parties. (R., 16) The tax in question, as to appellant, is in essence a tax on the use of gasoline consumed in interstate commerce, thus violating the commerce clause of the Federal Constitution. (R., 20-23) It "stores" and "distributes" such gasoline only as a necessary and incidental step in its consumption in interstate railroad operation. (R., 16-19)

(d) Forty per cent of this gasoline merely passes through the Railway's general storehouse at Nashville. It is not bought in Tennessee—it is not used in Tennessee—it never comes to rest in the legal sense in Tennessee—it is used exclusively by the Railway in Kentucky, Alabama, and Georgia on its own privately owned property in operating its own railroad. To permit Tennessee to tax that gasoline would be so unreasonable as to lack due process of law under the Fourteenth Amendment, besides being a direct and illegal burden on interstate commerce. (R., 20-23, 28)

(e) To charge the Railway for the use of gasoline in operating its interstate railroad the same compensation it exacts of competing common carriers by motor vehicle for actual use of the public highways as a place of business violates the due process and equality clauses of the Fourteenth Amendment. Such charges are in fact compensation for the use of "special facilities" furnished by the State, which "special facilities" the Railway does not use, and are the means of enabling competing motor vehicles to take business which otherwise would be handled by the Railway. (R., 20-23)

(f) Tennessee has adopted two series of statutes or two systems for taxing common carriers—one applicable to railroads — one applicable to motor vehicles. Considering the two systems as a whole, including the statutes here under attack,

that is, the aggregate "economic weight," the relative tax burden in Tennessee on railroads is over four hundred per cent more than that on competing common carriers by motor vehicle. This arbitrary action and this unreasonable discrimination are challenged under the Fourteenth Amendment. (R., 20-23)

Respondent public officials in the trial court filed a demurrer to the bill as amended and the chancellor, without opinion, sustained the demurrer and dismissed the bill. (R., 29, 32) The Railway appealed directly to the Supreme Court of Tennessee. (R., 33)

### Opinions of the Supreme Court of Tennessee

In the Supreme Court of Tennessee the Railway advanced the same propositions of law as in the trial court, and in an opinion (R., 7-8), less than a page in length, filed April 30, 1932, that court affirmed the decision of the chancellor, without discussing the questions involved, basing its decision solely on a recent opinion of the United States District Court at Nashville in the case of *American Airways, Inc.* v. *Roy C. Wallace, Comptroller*, 57 Fed. (2d) 877. (R., 8) It is to be noted that a minority of the court did not concur in the reasoning and conclusions of said District Court, but felt that it was the duty of the Supreme Court of Tennessee to conform its decision to that of said court. (R., 8)

Many of the questions presented by the Railway were not involved in said American Airways case, so a petition to rehear was filed (R., 9-11) and the Supreme Court of Tennessee on June 4, 1932, rendered its second opinion in this case. (R., 11-12) Without discussion it held that the tax in question applied to gasoline purchased by the Railway outside of Tennessee, passing through its Nashville shops for inspection, and actually used by the Railway in railroad operation in the states of Alabama, Georgia and Kentucky. (R., 11-12)

The court likewise held that the particular statutes here under attack applied alike to all affected thereby so that the Fourteenth Amendment was not violated. That court apparently attached no importance to the fact that the so-called tax in question was really compensation for the use of the public highways which the Railway did not use; and that a comparison between the two systems of taxes as a whole—one applicable to railroads and one to motor carriers—showed arbitrary, indefensible and material favoritism to the latter. (R., 11-12)

The Railway thereupon perfected its appeal to this court making the same federal questions here which it made in the trial court and in the Supreme Court of Tennessee. (R., 1-6)

## SPECIFICATION OF ERRORS

### I.

Chapter 58 of the 1923 Acts of Tennessee, as amended, violates the commerce clause of the Federal Constitution and the Fourteenth Amendment thereto in that it undertakes to require appellant Railway to pay an excise tax for the privilege of doing a gasoline business, which business the Railway does not do and cannot under its charter and the laws of Tennessee legally do. The mere use of gasoline in carrying on interstate commerce by a railroad cannot be distorted by statute into the carrying on of a separate and distinct business for which a railroad can be forced to pay a *special privilege tax.* (R., 2-5)

### II.

A state has no power under either the commerce clause or the Fourteenth Amendment to segregate the use of the many commodities essential to interstate railroad operation so as to make the consumption of each a separate business on which it can impose a separate privilege tax. (R., 2-5)

III.

Said series of acts violate the commerce clause of the Federal Constitution because, stripped of phraseology and terminology, the practical operation and effect is to impose a direct tax on the use of a commodity essential to and consumed in interstate railroad operation. (R., 2-5)

IV.

Tennessee cannot under either the commerce or due process clause of the Federal Constitution impose a tax on gasoline which is neither bought nor used in Tennessee but merely passes through the Railway's general storehouse in Nashville, Tennessee, for actual consumption in Alabama, Georgia, and Kentucky as the exigencies of railroad operation require. (R., 2-5)

V.

Tennessee has undertaken to finance its highway system by making those who use it pay compensation therefor in proportion to the gasoline consumed thereon. This is the legal equivalent of a special assessment for special benefits.

To force appellant Railway to pay compensation (as distinguished from general property taxes) for the use of "special facilities" furnished by

the State, which it does not use is arbitrary action; to charge those who do use and those who do not use such "special facilities" the same compensation for such use is both arbitrary action and unreasonable discrimination; to make the railroads thus build and maintain roadways for their common carrier competitors is an illegal burden on interstate commerce by railroad. (R., 2-5)

VI.

Tennessee has adopted two separate systems, each made up of several separate statutes, for the taxation of common carriers by railroad and common carriers by motor vehicle. Considering the two systems, each in its entirety, including the series of statutes here under attack, the tax burden on railroads in Tennessee is over four hundred per cent greater than the tax burden on competing common carriers by motor vehicle. This gross disparity in "economic weight" is arbitrary action and unjust discrimination under the Fourteenth Amendment. (R., 2-5)

## ARGUMENT

The difficulty in the case at bar is that the statutes under attack clearly say one thing—and clearly mean another. They were devised to make road users pay compensation for the use of "special facilities" furnished by the State measured by the volume of gasoline consumed.

The Tennessee legislature, apparently thinking only of filling stations, undertook to make those actually in the gasoline business collect from the road users — and pay such collections over to a *special fund* "to be used solely in the construction and maintenance of a highway system in the State" as privilege taxes. The road user actually pays and knows and understands that he is so paying. (R., 18-20)

The trouble arose when it was found that some non-road users consumed large quantities of gasoline. Unfortunately the test case of *Foster and Creighton* v. *Graham*, 154 Tenn. 412, involved a *road user*—and the statutory charge was properly sustained but *on the wrong grounds.* This is the genesis of all our trouble.

Appellant Railway has automobiles using the public highways and pays and should pay compensation for such use as these statutes provide. (R., 18)

But the Railway uses other gasoline on its own private property in railroad operation—this was a contingency which obviously the legislative mind did not anticipate.

This gasoline is bought outside Tennessee and moves in bulk quantities in interstate commerce to the Railway's storehouse in Nashville, Tennessee, for checking by the Railway "as to quality and quantity." (R., 16) At any given time sufficient for about thirty days use is on hand. (R., 16) Then it is used—about sixty per cent in Tennessee, about forty per cent in Georgia, Alabama, and Kentucky. The movement is substantially continuous and differs not at all from the purchase and use of coal, lumber, steel and other commodities necessary to railroad operation. (R., 16)

All of the Railway's lines are through highways of interstate commerce—practically every train is engaged in handling interstate commerce. (R., 21) Typical uses are detailed in the original bill, showing that it would be impossible to separate gasoline consumed in interstate commerce from that consumed in intrastate commerce. (R., 17-18)

The Tennessee Supreme Court's opinion held that all such gasoline, even that used in Georgia, Alabama, and Kentucky, was subject to the burden of these statutes. (R., 11)

This is the situation and, in the light thereof, we thus summarize our argument.

### Summary of argument

1. If these statutes are taken literally and construed to mean exactly what they say, namely, that they impose privilege taxes for the doing of a gasoline business, then appellant Railway may not consistently with the due process and commerce clauses of the Federal Constitution be taxed thereunder, as it is not engaged in the gasoline business and can, under its charter and the laws of Tennessee, engage in no business except that of operating a railroad.

2. The operation of a railroad involves the doing of many different things, all tending to the same end, namely, the transportation of persons and property. A state cannot under said due process and commerce clauses reduce "railroading" to its basic elements and claim that, because a railroad uses steel, water, lumber, gasoline and coal, it is engaged in the steel business, the water business, the lumber business, the gasoline business, and the coal business; and, having made this artificial separation by legislative fiat, it cannot then impose a separate privilege tax—wholly distinct from the privilege of doing an intrastate railroad business—on the doing of each of these various things.

3. There is no sale in Tennessee of the gasoline here involved and none of it is consumed on public property, but all of it is used on privately owned railroad property in railroad operation. While the Railway does both an interstate and intrastate business, there is no practicable way to so separate the gasoline thus used. It is consumed in the same way as coal in the fire box of a locomotive or water in its boiler. As there are no local sales, as the gasoline is not used in a local business, as it is not consumed on the public highways, to impose a tax on the use of this gasoline—the amount of the so-called tax increasing as interstate business increases—results, in practical operation and effect, in a direct burden on interstate commerce.

4. Forty per cent of the gasoline in question stops only a few days at the Nashville shops in Tennessee for inspection—then moves out in interstate commerce for consumption in Alabama, Georgia and Kentucky. This gasoline never comes to rest, in the technical sense, in Tennessee, but merely passes through the Railway's general storehouse in Tennessee in substantially a continuous movement in regular course of business. Such gasoline certainly under no conditions may be taxed by the State of Tennessee.

5. The charges imposed by these statutes are not general property taxes—nor taxes on local sales nor on the doing of a local business. They are nothing more or less than compensation for the

use of "special facilities" furnished at great expense by the state. It is not due process of law to force a citizen to pay compensation (as distinguished from a tax) for something it does not use.

To make a railroad (wholly separate from taxes proper) thus help construct and maintain highways for its competitors by motor vehicle—making those using and those not using the highways pay on exactly the same basis—is so palpably arbitrary as to lack due process of law and so viciously discriminatory as to deny it the equal protection of the laws; and is a burden on interstate commerce.

6. Common carriers by railroad in Tennessee are subject to various taxes which together constitute one system—common carriers by motor vehicle are subject to various taxes and these jointly constitute another system. It is entirely proper for the state thus to classify; and it is not indispensable that the ultimate burden or "economic weight" on common carriers by railroad and common carriers by motor vehicle be exactly the same. But it is indispensable that the tax burden on these two competing businesses be in their ultimate effect relatively the same. However, the system in Tennessee as applicable to railroads imposes a burden, everything considered, over four hundred per cent greater than the system applicable to common carriers by motor vehicle.

This is arbitrary action and indefensible discrimination under the Fourteenth Amendment.

With this summary of our views we proceed in some detail to enlarge upon them.

## I.

**The state statutes under attack impose an excise tax for the privilege of doing an intrastate gasoline business which appellant Railway neither does nor can legally do.**

The rules for the construction of these statutes are simple. In *United States* v. *Standard Brewery*, 251 U. S. 210, 217, this court said: "Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written. . . ."—or, as said in *United States* v. *Sprague*, 282 U. S. 717, 731, ". . . . where the intention is clear there is no room for construction. . . ." Again, in *Crooks* v. *Harrelson*, 282 U. S. 55, 61, this court said: "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring *adherence to the letter* applies with peculiar strictness. . . ."

The caption of chapter 58 of the 1923 Acts requires corporations "engaged in or carrying on the business in this State of selling gasoline . . . .

to pay to the State Comptroller a privilege tax for engaging in and carrying on such business in this State. . . ."

Chapter 67 of the 1925 Acts amends the caption of said chapter 58, just quoted, by adding after the word "selling" the words "or storing or distributing." Language could not be plainer. "Adherence to the letter" demonstrates that this tax is to be paid only by those engaged in the gasoline business.

(a) Appellant's charter is a public act of Tennessee, namely, chapter 1 of the Acts of 1845-1846. (R., 13) Section 1 thereof provides: "That for the purpose of establishing a communication by railroad . . . . the formation of a company is hereby authorized . . . . by the name and style of 'The Nashville & Chattanooga Railroad Company' . . . ."

Neither this original charter nor any amendments authorize it to engage in any business except the railroad business. There is no general statute in Tennessee authorizing a railroad to engage in any other business.

In Tennessee corporations have no powers except those contained in their charters or granted by the general laws of the land. The rule is thus stated in *Knapp* v. *Golden Cross*, 121 Tenn. 212, 231, where the Tennessee Supreme Court said:

> "Corporations are creatures of the legislative department of the government, and exist solely and alone by virtue of the act of incorporation. They can exercise no powers which are not expressly granted them, or are necessarily implied from the express powers given. Authority for all their acts must be found in their charters, or the general laws of the State of their creation. Where the charter or law is silent as to the power sought to be exercised, it does not exist; and wherever a grant of corporate power is claimed by a corporation, it must clearly appear and will not be inferred or presumed."

This is the rule of law steadfastly maintained in Tennessee. See also *Doty* v. *Telephone Co.*, 123 Tenn. 329, 338-339, and *Turner* v. *Eslick* 146 Tenn. 236, 240. It is perfectly obvious, therefore, that under the charter and laws of Tennessee appellant Railway cannot engage in the gasoline business.

(b) The Supreme Court of Tennessee in its opinion (R., 8) based its decision, without comment, on *American Airways, Inc.*, v. *Roy C. Wallace, Comptroller*, 57 Fed. (2d) 877. That court, relying on the decisions of the Tennessee Supreme Court, thus construed the laws in question:

> "The statute in question does not impose a property tax upon the gasoline, but it imposes an 'excise' or 'privilege' tax *upon the business* of storing and withdrawing the gasoline

and the amount is computed upon withdrawals.

. . . . . .

"The Tennessee statute imposes an excise or privilege tax upon the business of storing and distributing gasoline, and this tax accrues whether the gasoline is used in interstate commerce or otherwise . . . .

"It is simply *a privilege tax upon engaging in a business within the state*, and applies to all persons, firms or corporations doing a like business."

This decision of the United States District Court, so far as it construed the Tennessee statutes, was approved by the Tennessee Supreme Court (R., 8), and was in conformity with *Foster and Creighton* v. *Graham*, 154 Tenn. 412.

(c) In Tennessee the mere ownership, use or enjoyment of property cannot be made a taxable privilege. *Vanderbilt University* v. *Cheney*, 116 Tenn. 259, 267-269. Incidental activities are not enough—a corporation must "make a business" of doing something to constitute the basis of a privilege tax. *Trentham* v. *Moore*, 111 Tenn. 346, 353. An excise tax and a privilege tax are one and the same and constitute a tax, not on property, nor on sales, nor on the use of property, but on the "*doing of business.*" Appellant Railway pays a privilege tax on its intrastate railroad business under chapter 21, 1923 Acts of Tennessee. (R., 22) See *Bank* v. *Senter*, 149 Tenn. 569; *Hill* v.

*Whitice*, 149 Tenn. 168; and *Quicksafe Manufacturing Co.* v. *Graham*, 161 Tenn. 46.

(d) The Railway never sells any gasoline—it does keep a few days supply on hand for itself. It is no more engaged in the storage business than a housewife who keeps some thirty days supply of kerosene on hand. Compare *Rafferty* v. *New Brunswick Fire Ins. Co.*, 3 Harrison (N. J.) 480, 38 American Decisions 525, 529, and *Hanover Fire Insurance Co.* v. *Eisman*, 45 Okla. 639, 146 Pacific 214, 218. It stores no gasoline for others and no others use any of it. (R., 16)

The Railway after buying this gasoline distributes it over its system as the exigencies of operation requires. It is handled just as other railroad supplies. No third parties ever use any. (R., 16)

(e) It thus being apparent that the Railway does not in fact do a gasoline business, (R., 16-18) and that under its charter and the laws of Tennessee it *could not engage in the business of selling, storing or distributing gasoline*, the question arises whether the state has the power by legislative enactment to make a railroad pay a privilege tax for the doing of a business which it neither does in fact nor can legally do under the law.

In *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639, 642, this court said: "Legislative

fiat may not take the place of fact in the judicial determination of issues involving life, liberty and property." In *Smith* v. *Cahoon*, 283 U. S. 553, 567, this court held that a state had no power by legislative act to change the business of a private carrier into that of a common carrier.

In *Bowers, Executor*, v. *Lawyers Mortgage Co.*, 285 U. S. 182, 190, this court said:

> "Respondent's business is one which may be and is in fact carried on by corporations organized under the New York banking laws. The element of insurance may not properly be regarded as more than an incident thereof; it certainly is not sufficient to make respondent an 'insurance company' within the meaning of that phrase as it is commonly used and understood. . . .
>
> "In the case before us, respondent's charter authority extended not only to the business of insurance but also to other lines, including that of investment, with or without guaranties as it might choose. As above shown, the element of guaranty involved in its transactions in the tax years was not sufficient to make it an insurance company."

Under that decision the use of gasoline in railroad operation, *and its incidental storage and distribution*, do not change the character of appellant's business from railroading to gasoline.

In *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555, 566-567, this court said: ". . . . the

power to tax depends upon what was done and not upon what might have been done. Moreover, the license issued by the State authorized appellant to engage 'exclusively in the business of transporting crude petroleum by pipe line.' "

If appellant Railway had sold gasoline or stored for or distributed to others in violation of its charter and of the general law, whether a privilege tax for doing these unlawful acts could be imposed is not here involved. The point is the Railway is not as a fact in the gasoline business. (R., 16)

In *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 286, this court said: "Taxes must follow realities . . . ." What could be more unreal than to impose upon The Nashville, Chattanooga & St. Louis Railway a tax for the privilege of doing a business which it neither does in fact nor can do under the laws of the state where it was chartered. These statutes, we assert, being applicable, as the Supreme Court of Tennessee held, to appellant Railway, are as to it in violation of the due process and commerce clauses of the Federal Constitution.

The Fourteenth Amendment applies to all state agencies, *Georgia Power Co.* v. *Decatur*, 281 U. S. 505, 508, and inhibits Tennessee from enforcing a statute against appellant Railway applicable only to those "engaged in or carrying on the business in this State of selling or storing or distributing gasoline. . . ."

Certainly nothing could be more shocking to the sense of fair play ordained by the due process clause of the Fourteenth Amendment than to make a railroad pay a privilege tax for doing a railroad business measured by its intrastate business (R., 22); and then, by legislative fiat, undertake to make the various acts constituting "railroading" in the aggregate into separate businesses, for the doing of each of which a separate privilege tax is charged. See *Shelton* v. *Silverfield*, 104 Tenn. 67; *Michigan Public Utilities Com.* v. *Duke*, 266 U. S. 570, 576-578; *Frost* v. *Railroad Commission*, 271 U. S. 583, 592; and *Smith* v. *Cahoon*, 283 U. S. 553, 567.

## II and III

A state cannot by any device constitutionally impose a direct burden on interstate commerce.

If we ignore the clear phraseology of these statutes and their construction by the Tennessee Supreme Court and look only to their practical operation and effect with reference to appellant, it would seem obvious that, to the extent they apply to gasoline consumed in railroad operation, they are invalid under the commerce clause of the Federal Constitution—and that is a question for this court to decide. *Alabama and Vicksburg Railway* v. *Jackson and Eastern Railway*, 271 U. S. 244, 250.

We repeat for emphasis that all the gasoline in question is used in railroad operation on railroad property and none of it on the public highways. The bill of complaint details numerous uses of this gasoline; for example, the employees who inspect automatic signals and track use this gasoline in little motor cars running up and down the line. (R., 17) Every track is a through highway of interstate commerce and practically every train carries interstate passengers or freight. (R., 21) Obviously there is no way to segregate that part of the gasoline consumed in interstate commerce from that consumed in intrastate commerce, just as it would be impossible to say with any accuracy how much of the coal consumed on a given run of a locomotive pulling a train carrying both interstate and intrastate freight should be allocated to interstate commerce and how much to intrastate commerce.

(a) In *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307, this court said: "But the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce."

So in *New Jersey Telephone Co.* v. *Tax Board*, 280 U. S. 338, 346, 347, this court said: ". . . . , a State may not tax, burden or interfere with such commerce. . . ." Furthermore, a tax, regardless of what it may be called, is invalid if, as a

practical matter, it "operates to burden or regulate interstate business."

So in *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10, this court said:

> "One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce. Minnesota v. Barber, 136 U. S. 313, 319. Brimmer v. Rebman, 138 U. S. 78, 81. In determining what is interstate commerce, courts look to practical considerations and the established course of business. Swift and Co. v. United States, 196 U. S. 375, 398. Lemke v. Farmers Grain Co., 258 U. S. 50, 59. Binderup v. Pathe Exchange, 263 U. S. 291, 309. Shafer v. Farmers Grain Co., 268 U. S. 189, 198, 200. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a state statute that operates directly to burden any of its essential elements is invalid."

To the same effect see

*Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 222.
*Colorado* v. *United States*, 271 U. S. 153, 162-163.
*Texas Transport & Terminal Co.* v. *New Orleans*, 264 U. S. 150.

*Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259.
*International Paper Co.* v. *Massachusetts*, 246 U. S. 135, 141-142.

(b) Probably as good a yardstick as has been devised to apply the well known rule is this; if there were no intrastate commerce would there be any tax; or to put it another way, does the increase in interstate commerce increase the proposed tax?

This court thus expressed the rule in *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470:

> "And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business."

In *Sprout* v. *South Bend*, 277 U. S. 163, 170-171, this court said:

> "A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. . . . But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not in-

> creased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

So in *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 297, this court held that the tax there challenged, varying as the volume of foreign commerce varied, was obviously a direct burden upon it and therefore invalid. See also *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114, 120.

It is perfectly obvious from the construction placed upon these statutes by the Supreme Court of Tennessee in this particular case that, *if the railroad did no intrastate business at all, the tax would be just the same; that the more gasoline consumed even in interstate commerce alone, the more the tax.*

(c) It may be suggested, in the light of some statements in *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, that so much of the tax in question as may relate to gasoline used exclusively in intrastate commerce would be valid. Our answer to that proposition is that, from the very nature of the use of his gasoline, it is impossible to separate that consumed in and for interstate commerce from that consumed in and for intrastate commerce.

The gasoline in question is "not in its nature divisible" and comes within the rule of this court so announced in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647, 648, and *United States* v. *New York Central Railroad Co.*, 272 U. S. 457, 464. See also *Mid Continent Air Express* v. *Lujan*, 47 Fed. (2d) 266, and *United States Airways* v. *Shaw*, 43 Fed. (2d) 148.

As aforesaid, the actual uses of this gasoline, as shown by the detailed statements of the original bill (R., 16-18), demonstrate that there is no possible way to separate the amount of gasoline consumed in interstate commerce from that consumed in intrastate business, with the result that the tax as a whole, as applicable to such a railroad as appellant, is invalid.

> The burden imposed by the statutes under attack is not based either on use or sales in Tennessee, so that such cases as *Eastern Air Transport, Inc.*, v. *South Carolina Tax Commission*, 285 U. S. 147, are irrelevant.

The United States District Court in Nashville, in *American Airways, Inc.* v. *Wallace*, 57 Fed. (2d) 877, relied in part on said *Eastern Air Transport* case, and the Tennessee Supreme Court relied exclusively on the decision of said District Court. (R., 8) We think we can demonstrate there is nothing in the decision of this Court in that case inconsistent with our position here.

The gasoline in question was purchased outside of Tennessee and moved in interstate commerce into Tennessee. There a part of it was consumed in railroad operation and a part of it, in practically a continuous movement, went to Kentucky, Alabama and Georgia and was there used in railroad operation. There was no sale of any of the gasoline in question in Tennessee and such of it as was used in Tennessee was used in railroad operation in a manner and to an extent as to make separation between that consumed in intrastate commerce and that consumed in interstate commerce impossible. (R., 16-18)

*Eastern Air Transport, Inc.* v. *South Carolina Tax Commission,* 285 U. S. 147.

In that case there was involved the validity of a South Carolina statute imposing a privilege tax on corporations "doing domestic or intrastate business within this State," and the amount of tax was measured by the *local sales* within the State. The gasoline was sold by an oil company, which paid the tax and did not complain, but the purchaser filed suit on the theory that it indirectly paid this tax and as it expected ultimately to use the gasoline so purchased in interstate commerce the taxing statute was invalid. This court held the statute valid, saying:

> "The tax is described in the statute as a license tax, which, as applied in the instant case against the dealer, is for the privilege of

> carrying on the business of selling gasoline within the State. The tax is thus imposed upon the seller and the sales in question are intrastate sales. . . . Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions. . . . A non-discriminatory tax upon *local sales* in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected."

We repeat that in the case at bar there were no local sales in Tennessee, either to or by the Railway, so this case is no authority for the action of the Tennessee Supreme Court.

*Gregg Dyeing Co.* v. *Query*, 52 S. Ct. 631, 286 U. S. 472.

In this case the Gregg Dyeing Company operated the local business of bleaching in Aiken, S. C. South Carolina had a statute imposing a so-called license tax of six cents on gasoline stored or used within the state. It specifically applied to gasoline imported from other states "after the same shall have lost its interstate character." In holding this tax valid against the challenge based on the commerce clause of the Federal Constitution this court said:

"The gasoline has come to rest within the state, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the state has the authority 'to tax the products or their storage or sale.' Texas Co. v. Brown, 258 U. S. 466, 478, 42 S. Ct. 375, 379, 66 L. Ed. 721; Sonneborn Bros. v. Cureton, 262 U. S. 506, 519, 520, 43 S. Ct. 643, 67 L. Ed. 1095; Hart Refineries v. Harmon, 278 U. S. 499, 501, 502, 49 S. Ct. 188, 189, 73 L. Ed. 475. Not only may *local sales* of gasoline thus brought into the state be taxed, but its use as well. This was specifically determined in Bowman v. Continental Oil Co., 256 U. S. 642, 648, 649, 41 S. Ct. 606, 65 L. Ed. 1139. See Hart Refineries v. Harmon, supra; Breece Lumber Co. v. Asplund, 283 U. S. 788, 51 S. Ct. 352, 75 L. Ed. 1415. *There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation.*. Helson v. Kentucky, 279 U. S. 245, 252, 49 S. Ct. 279, 73 L. Ed. 683; Eastern Air Transport v. South Carolina Tax Commission, 285 U. S. 147, 52 S. Ct. 340, 76 L. Ed. 470, decided March 14, 1932. In view of these well-established principles, we find no ground for concluding that the state could not impose the tax with respect to the gasoline of appellants which was kept within the state for use in their *local enterprises.*"

The gasoline there involved had come permanently to rest—it was not to be transported further—it was not to be used except in "local enterprises." This court was very careful to qualify

the rule as stated for instances involving interstate commerce.

*East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465.

In this case there was involved the validity of an Ohio statute imposing an excise tax on the privilege of carrying on the intrastate business of supplying consumers within the State with natural gas. The tax was measured by the volume of intrastate business and in specific language it excluded receipts "derived wholly from interstate business." This court held that statute valid, saying this:

> "Admittedly the exaction is not a tax on property nor in lieu of a property tax. The statute calls it, and in fact it is, a tax for the privilege of carrying on intrastate business. Receipts from interstate business are expressly excluded from the calculation. It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. Pullman Co. v. Richardson, 261 U. S. 330, 338. New Jersey Tel. Co. v. Tax Board, 280 U. S. 338, 346. And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and

> that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. . . . (470)
>
> "It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State. . . . (471)
>
> "The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce." (472)

In the case at bar the so-called tax is not measured by local sales or by gas consumed in intrastate commerce. It was held by the Tennessee Supreme Court to apply to all gasoline consumed by the Railway not only in Tennessee but even in the states of Alabama, Georgia, and Kentucky. (R., 11) *If the Railway did only an interstate business, the tax would be just the same.*

We content ourselves now with the mere citation of a few authorities on this general proposition.

*State Tax Commission of Mississippi* v. *Interstate Natural Gas Co., Inc.*, 284 U. S. 41.

*Furst* v. *Brewster*, 282 U. S. 493, 497-498.

*Ohio Oil Co.* v. *Conway*, 281 U. S. 146.

*International Shoe Co.* v. *Shartel*, 279 U. S. 429, 433.
*Hart Refineries* v. *Harmon*, 278 U. S. 499.
*Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 565-567.
*Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71.
*Transcontinental & Western Air, Inc.*, v. *Lujan*, 8 Pac. (2d) 103.
*Prouty* v. *Coyne*, 55 Fed. (2d) 289.

***Helson and Randolph* v. *Kentucky*, 279 U. S. 245, seems to control this case.**

If, as aforesaid, we ignore both the actual phraseology and construction of these statutes by the Tennessee Supreme Court and look solely to their practical effect, it is obvious that a tax is imposed upon gasoline consumed in interstate commerce, varying directly with the amount of such commerce. *If there were no intrastate commerce, the tax would be just the same.* It seems, therefore, that the Helson and Randolph case is controlling.

In that case Helson and Randolph operated a ferry boat on the Ohio river between Kentucky and Illinois and the motive power was created by the consumption of gasoline which was purchased in the state of Illinois. Kentucky undertook to impose a tax on the sale or use of the gasoline in Kentucky. A part of the gasoline in question was consumed within the limits of the state of Kentucky. The question was whether the state had the power under the commerce clause of the Fed-

eral Constitution to impose this tax, and this court in holding the state had no such power said:

> "Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this Court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the state under the Constitution. It is likewise settled that transportation by ferry from one state to another is interstate commerce and immune from the interference of such state legislation. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 217; Mayor of Vidalia v. McNeely, 274 U. S. 676, 680. The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. Gloucester Ferry Co. v. Pennsylvania, supra, p. 204. A state cannot 'lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.' Leloup v. Port of Mobile, 117 U. S. 640, 648; Lyng v. Michigan, 135 U. S. 161, 166; Ozark Pipe Line v. Monier, 266 U. S. 555, 562. While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce. Adams Express Com-

pany v. Ohio, 166 U. S. 185, 218. . . . (pp. 248-249)

"The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.' Gloucester Ferry Co. v. Pennsylvania, supra, 214." (p. 252)

If a state cannot tax the actual use of such gasoline, it certainly cannot tax the preliminary steps under the fiction that the carrier was a "storer" or "distributor."

## IV.

Our fourth specification of error challenged the power of the state, regardless of everything else, to impose this tax or charge on gasoline temporarily at the Railway's storehouse in its Nashville shops and actually used in railroad operation in Alabama, Kentucky and Georgia.

We must refer again briefly to the facts. The purchasing agent at Nashville buys gasoline for the Railway's system. The sales are not within the State and the gasoline moves interstate in bulk quantities, not immediately to the various points of consumption, but to the general storehouse at Nashville, for the purpose of being inspected by the Railway as to both quality and quantity. (R., 16) This gasoline is used daily and the volume on hand ordinarily is sufficient for some thirty days necessities. (R., 16) Approximately forty per cent of the total volume so purchased moves in interstate commerce into the Nashville shops, then moves out in due course to Kentucky, Alabama, and Georgia, and is there consumed by the Railway in railroad operation in those states. It is a regular course and substantially a continuous movement. (R., 16-17)

The Supreme Court of Tennessee specifically held that this large volume of gasoline, purchased outside of Tennessee, moving practically in continuous shipments through Tennessee, and actually consumed in other states, was subject to this

state tax, "without regard to the place of ultimate use." (R., 11)

Whatever may be said of the gasoline consumed in Tennessee, certainly that State cannot tax gasoline consumed in Georgia, Alabama, and Kentucky, because that gasoline was bought outside of Tennessee, consumed outside of Tennessee, and never lost its interstate character because, temporarily, it had been stopped at the Nashville shops for inspection. Goods may be stopped for compression or milling in transit, or they may be held awaiting a full load, and yet the mere fact that temporarily such goods are not in motion does not deprive them of their interstate character. See *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 35; *Furst* v. *Brewster*, 282 U. S. 493, 498; *Champlain Realty Company* v. *Brattleboro*, 260 U. S. 366; *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, 513; *Carson Petroleum Company* v. *Vial*, 279 U. S. 95.

This movement through the Nashville shops was substantially continuous and was the regular "course of business." See *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290-292; *McFadden, et al.* v. *Alabama Great Southern*, 241 Fed. 562.

The Tennessee Supreme Court gave no reason and cited no authorities for holding that this portion of the gasoline involved was subject to tax by the State of Tennessee. The only case which it

cited (R., 8) did not involve that question. Certainly this gasoline, bought outside of Tennessee and used outside of Tennessee, passing through its general storehouse in Nashville, in a practically continuous movement, to use elsewhere in interstate railroad operation, cannot be taxed by the State of Tennessee in any manner or through any guise or device under such cases as *Airway Corporation* v. *Day*, 266 U. S. 71.

## V.

We have undertaken to demonstrate (page 23 supra) that the statutes in question, so far as their actual verbiage is concerned, are perfectly clear and definite and can only be applied to those engaged in the business of selling, storing and distributing gasoline, and that, therefore, they are invalid as applicable to a corporation doing and authorized to do only a railroad business.

There is, however, another canon of construction which must be considered, and that is that the name by which a state may call a tax is not controlling—". . . . , a characterization of the tax by the state court is not binding here," *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 401—"Actual facts govern," *Sprout* v. *South Bend*, 277 U. S. 163—the "practical effect" controls, *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 222—it is the "practical operation, not its definition, . . . . which controls," *Lawrence, et al.* v. *State Tax*

*Commission of Mississippi*, 52 S. Ct. 556, 557, 286 U. S. 276; in the end it is "substance" and not "form" which controls. *Lacoste et al.* v. *Department of Conservation*, 263 U. S. 545, 550.

**The financial burdens imposed by the statutes under attack are in fact charges by the State as compensation for the use of its highways, as distinguished from taxes proper.**

On page 1, *supra*, we refer to the "so-called gasoline taxes" because we do not believe that, technically speaking, the burdens imposed by these statutes are properly denominated "taxes." We think that a reading of these statutes clearly shows that the Tennessee General Assembly intended, as a method of financing and constructing its highway system, that those using the same should pay compensation therefor based on the use as measured by the number of gallons of gasoline consumed. The bill shows, and it is admitted by the demurrer, that in their practical operation the charges imposed by these statutes are passed on to the road users and those who actually engage in the gasoline business make public the price of the gasoline proper and then the additional charges under these statutes. (R., 18-20)

(a) "A tax is an enforced contribution to provide for the support of government; . . .", *United States* v. *La Franca*, 282 U. S. 568, 572; but the funds collected under these statutes are "to be used solely in the construction and maintenance of a

highway system in the state" (See caption of said chapter 58, page 73, *infra.*) and do not go into the general funds of the state to pay what is ordinarily called the "cost of government." We do not suggest that the construction of highways is not a governmental function. But there is a clear distinction between an ad valorem tax used to build highways and a charge on a highway user in proportion to the use; and, getting away from phraseology and technicalities, that is what is involved in this case. It should be borne in mind that on all the gasoline which the Railway buys in Tennessee and uses on the public highways it pays the charges in question. (R., 18)

(b) If there be any constitutional principle well settled it is that a state cannot by any device directly burden or tax interstate commerce. But a state may charge one, even engaged exclusively in interstate commerce, a charge for the use of its highway system on which to do business. This is not an exception to the rule because such a charge is not really a tax but compensation for the use of public property. On this point we quote from *Prouty* v. *Coyne*, 55 Fed. (2d) 289, 292, as follows:

> "The state may constitutionally impose a tax burden on interstate commerce as compensation for the use of the public highways, provided the charge is only a reasonable and fair contribution to the expense of construction and maintenance of such highways and of regulating the traffic thereon. Kane v.

New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222; Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199; Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 504, 72 L. Ed. 833; 62 A. L. R. 45; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551; Interstate Transit, Inc., v. Lindsey, 283 U. S. 183, 51 S. Ct. 380, 382. 75 L. Ed. 953; Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385."

In *Clark* v. *Poor*, 274 U. S. 554, 557, this court said:

> "Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. Hendrick v. Maryland, 235 U. S. 610; Kane v. New Jersey, 242 U. S. 160. Compare Packard v. Banton, 264 U. S. 140, 144."

*Interstate Transit, Inc.*, v. *Lindsey*, 283 U. S. 183, clearly recognizes the difference between a tax going to support the cost of government and a charge for the use of the highways to be expended in their construction and maintenance. A charge under that case going into the general fund would not be valid, whereas the same charge used to construct and maintain the highways would be valid.

In *New Jersey Telephone Co.* v. *Board*, 280 U. S. 338, 347, this court said: "Clearly the State,

when passing the Act making the assessment, acted, not as a proprietor demanding compensation for the use of its property, but as sovereign imposing a tax for the support of government."

This can only mean, we believe, that it is one thing to impose a tax to support the government and an entirely different thing to make a charge for the use of the public highways as a place of business.

The following cases recognize the difference in taxes proper and a charge to users of "special facilities" furnished at great expense by the state.

*Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 52 S. Ct. 595, 599.
*Alward* v. *Johnson*, 282 U. S. 509, 513-514.
*Carley & Hamilton* v. *Snook*, 281 U. S. 66, 71.
*Bekins Van Lines* v. *Riley*, 280 U. S. 80.
*Sprout* v. *South Bend*, 277 U. S. 163, 170.
*Michigan Public Utilities Com.* v. *Duke*, 266 U. S. 570.
*Hendrick* v. *Maryland*, 235 U. S. 610, 622-624.
*Boeing Air Transport* v. *Edelman*, 51 Fed. (2d) 130.

We submit that the justification of the charges imposed by these statutes was the use of the public highways for transportation purposes, such charges to vary with the use. This is its actual practical effect. (R., 18-20) For the gasoline so

used the Railway pays the charge in question. (R., 18)

(c) But the Railway uses none of this gasoline on the public highways. It is certainly elementary that one who does not use public property cannot be burdened with a special charge for its use. This is not the case of a general tax. Compare *St. Louis & Southwestern Ry.* v. *Nattin*, 277 U. S. 157.

The controlling rule has been applied often in cases involving special assessments in proportion to special benefits. If there be no benefit at all, there can be no assessment. *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478. Nor may the assessment be palpably disproportionate to the benefits.

*Kansas City Southern* v. *Road Improvement Dist.*, 256 U. S. 658, 661.
*Thomas* v. *Kansas City Southern*, 261 U. S. 481.
*Road Improvement District* v. *Missouri Pacific*, 274 U. S. 188, 194.
*Standard Pipe Line Co.* v. *Miller County Highway & Bridge Dist.*, 277 U. S. 160.

To charge competing common carriers the same rate on gasoline consumed in the transportation business—all the funds so collected being used for the construction and maintenance of the public highways—when one does all of its business on the "special facilities" furnished by the state and the

other none, is arbitrary action and unreasonable discrimination.

## VI.

The precise question presented by our sixth specification of error has never, so far as we can find out, been raised. The facts are that Tennessee has several separate statutes imposing tax burdens on common carriers by railroad; and likewise several separate statutes imposing tax burdens on common carriers by motor vehicle.

The money collected from the particular statutes here under attack does not go to defray the cost of government and the railroad gets no direct benefit therefrom. Quite to the contrary such funds are expended in the construction and maintenance of a roadway for the use of common carriers by motor vehicle to compete with appellant Railway, which must furnish its own roadway. This in and of itself would seem to be so arbitrary and unreasonable as to lack due process of law; but the fact is, taking the series of tax statutes applicable to railroads on the one hand and the series of tax statutes applicable to common carriers by motor vehicle on the other, we find gross discrimination, which was thus specified in the bill of complaint:

"VIII

. . . . . .

(b) "All of the funds collected under this series of acts commencing with said Chapter 58 of the 1923 Public Acts go exclusively to the maintenance and construction of the highway

system of the State. None of such taxes go into the general fund of the State and none are available for any except road or similar purposes. No part of these funds are expended for facilities which complainant can or does use. Said tax was intended to be and is in fact passed along to the users of gasoline, most of which are operators of automobiles; and the theory of said series of acts is that thus motor vehicle users pay for the highways in proportion to their respective use.

"Complainant uses none of the gasoline here involved on the public highways but exclusively in the operation of its railroad on its own property, hence complainant is advised and avers, that these acts being intended to ultimately collect from road users in proportion to their use do not apply to the gasoline used by it in running its railroad on its own private property. . . . (R., 19)

IX

"(a) The series of acts here involved commencing with said Chapter 58 of the 1923 Acts constitutes the chief source of current revenues (except repeated bond and note issues) for the construction and maintenance of Tennessee's highway system and the theory thereof, as aforesaid, is that those using the highways shall by this system pay in proportion to their use. None of the gasoline here involved is ever used by complainant or others except on complainant's own private property in the operation of its railroad.

"(b) Complainant is already the subject of gross and, it is believed, illegal discrimination under the laws of Tennessee in the matter of its taxes as compared with its competitors on

the public highways. Under the Tennessee laws now in force motor carriers for hire obtain a highway bought and maintained by the State and governmental protection for approximately, on the average, five cents out of each dollar of gross revenue; while Tennessee railroads for the same thing must, on the average, pay approximately thirty-three cents out of each dollar of gross revenue. In other words, every kind of tax paid by motor carriers for hire (ad valorem, privilege, license, income, registration and gasoline) costs on the average five cents out of each dollar of gross revenue for which such motor carriers for hire receive not only governmental protection (as do all taxpayers including railroads) but a highway to do business on in competition with railroads, said highway being constructed and maintained by the State. To obtain the same thing railroads, on the average, as aforesaid, must pay out approximately thirty-three cents out of each dollar of gross revenue.

"(c) These facts in detail were presented to the last General Assembly and other public officials, were never disputed, are well and generally known, yet the constituted authorities have been and are willing to take no action to remove this palpable and arbitrary discrimination against railroads such as complainant.

"Filed herewith, marked Exhibits numbers 2 and 3, and made a part hereof, but not for copy, are Index numbers 42 and 47 of the detailed data presented by complainant to the 1931 Tennessee General Assembly and to the Interstate Commerce Commission, giving the

details, completely and accurately, as to such discrimination.

"(d) To require complainant (in addition to the disproportionate tax burden it now bears) to pay a tax on gasoline used solely in the operation of its railroad to help construct and maintain a highway for its competitors to use substantially free is, so complainant is advised and avers, a direct burden on interstate commerce, arbitrary discrimination against interstate commerce by railroad, so palpably arbitrary and unreasonable as to lack due process of law and so unreasonably discriminatory as to deny complainant the equal protection of the laws. . . . (R., 19-20)

X.

"(c) All of complainant's properties, lands, improvements thereon, tools, bridges and rolling stock are taxed ad valorem by the State of Tennessee, its counties, cities and special taxing districts; its franchises are so taxed; and it pays a state privilege and income tax on its intrastate operations, so that complainant as shown by said Exhibits 2 and 3 already is taxed about 400 per cent more than its motor vehicle competitors. To require railroads, such as your complainant, to pay, in addition to all general taxes as aforesaid, a privilege tax for using gasoline in the operation of its railroad in order to help construct and maintain highways for its competitors by motor vehicle, which are numerous and in active and successful competition with complainant on every part of its lines in Tennessee, is, so complainant is advised and avers, a direct and illegal burden on interstate com-

merce; arbitrary and unreasonable discrimination against railroads and against interstate commerce by railroads; and so palpably arbitrary, unreasonable and discriminatory that said Chapter 58 of the 1923 Acts, and the amendments thereto, are null and void as violating the 'commerce' clause of the Federal Constitution, the 'law of the land' clause of the Tennessee Constitution, and the 'due process' and 'equality' clauses of the Fourteenth Amendment." (R., 22)

Exhibits numbers 2 and 3 to the original bill (R., 24-26a) show that the actual operation of the two taxing systems applicable to these two competing forms of transportation results in common carriers by motor vehicle paying on the average five cents out of each dollar of gross revenue for governmental protection plus a right of way on which to do business, whereas the same thing costs the railroads 33.21 cents out of each dollar of gross revenue or nearly seven times as much!

The fact that this shocking disparity is due in part to the dereliction of public officials does not change the legal status of the situation. See *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239. Combining the averments of fact in the bill of complaint with these two exhibits, all of which were admitted by the demurrer, the inevitable conclusion is that the railroad's contribution to the support of government in Tennessee, making every allowance for the nature, amount and character of the property and their revenues, is over four hun-

dred per cent greater than that of its competitors using the public highways. The statutes here under attack are a part of this discriminatory system and undertake to make appellant Railway, in addition to all other taxes which it pays, help to directly finance a roadway for its competitors to use to undersell appellant which must furnish all of its own facilities.

(a) Classification in taxation is of course permissible. There is no practicable way to impose exactly the same burden on and give the same benefit to every taxpayer. ". . . A precise scientific uniformity" is neither possible nor necessary. *Lawrence, et al.* v. *State Tax Commission*, 52 S. Ct. 556, 559, 286 U.S. 276. There is a twilight zone of legality, or, to use an expression of Mr. Justice Holmes in *Klein* v. *Board of Tax Supervisors*, 282 U. S. 19, 23:

> "Thus we come to the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain."

Perhaps there is no better general statement of the law than in *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159-160, where this court said:

> "The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses

of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The State may tax real and personal property in a different maner. It may grant exemptions. The State is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure. Bell's Gap Railroad Company v. Pennsylvania, 134 U. S. 232, 237; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293; Southwestern Oil Company v. Texas, 217 U. S. 114, 121; Brown-Forman Company v. Kentucky, 217 U. S. 563, 573; Sunday Lake Iron Company v. Wakefield, 247 U. S. 350, 353; Heisler v. Thomas Colliery Company, 260 U. S. 245, 255; Oliver Iron Mining Company v. Lord, 262 U. S. 172, 179; Stebbins v. Riley, 268 U. S. 137, 142. *With all this freedom of action, there is a point beyond which the State can not go without violating the equal protection clause.* The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary.

> The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

(b) The propositions which we shall undertake to support are these:

Due process of law is nothing more nor less than justice and common sense — the equality clause does not forbid different treatment provided there are reasonable grounds for classification; but the Fourteenth Amendment does interdict state action of any kind which is palpably arbitrary, viciously discriminatory or inconsistent with fundamental principles of equity and fair play. *To make railroads finance their roadways, while the public finances the roadways of their competitors, common carriers by motor vehicle, is not only bad economics but indefensible discrimination.*

Equality of taxation under the Fourteenth Amendment means substantial equality not only of burden but of benefit. To give railroads, for the same degree of taxation, governmental protection only, while giving motor vehicle operators the same governmental protection plus a roadway built, maintained and policed at public expense as a place to do business is so palpably arbitrary as to lack due process of law and so viciously discriminatory as to deny equality under the law. *Unless a*

*given tax be general and ad valorem, then what the taxpayer gets as well as what he pays must be considered.*

(c) Under the decisions appellant Railway has a right to present the facts to support its charge of arbitrary action and unjust discrimination. *Lawrence, et al.* v. *State Tax Commission*, 52 S. Ct. 556, 558, 286 U. S. 276. The rule was thus stated in *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 251, "To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with *disproportionate economic weight* on it. . . ."

Equality of treatment is appellant's right. *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393, 403. It has shown the facts—the "economic weight" on railroads is over four hundred per cent greater than on its competitors, *due to the fact that the State furnishes a roadway for motor vehicles while railroads must buy, build, maintain and pay taxes on their own.*

(d) The Tennessee Supreme Court on this point merely said: "The tax imposed upon those storing gasoline applies to all alike. The statutes made no discrimination and it does not therefore contravene the provisions of the Fourteenth Amendment." (R., 11-12) It will thus be seen that the Tennessee Supreme Court cited no authority for

its decision and apparently thought that it was limited to the "four corners" of these statutes immediately under attack, *whereas we attack the two tax systems as a whole.* The Tennessee Supreme Court said nothing at all about this. This very question, that is, whether in a claim of discrimination a complainant is limited to one statute or may look to the aggregate effect of a system of statutes, was raised in *Gregg Dyeing Company* v. *Query*, 52 S. Ct. 631, 634, 286 U. S. 472, this court saying:

> "The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the state imposing a tax upon the sale and use of gasoline within the state. The state court said that the act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the act assailed. To stand the test of constitutionality, they say, the act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the state shall put its

requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power. Where the Supreme Court of the state has held that two or more statues must be taken together, we accept that conclusion as if written into the statutes themselves. Herbert v. Louisiana, 272 U. S. 312, 317, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 1102. See Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 73, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160.

"Reading together the statutes with respect to gasoline taxes, the state court took the view that, as to the gasoline tax with respect to sales within the state, the burden actually rests upon the consumer, although not placed upon the consumer directly. No reason is found to challenge this view."

(e) We have undertaken to show heretofore (page 47, *supra*) that the statutes in question do not levy a tax in the technical sense of an enforced contribution by a citizen or property owner towards the cost of government, but they really charge compensation for the use of the highways, using the money thus collected to build and maintain such highways. This is certainly the rationale of these statutes and is the way they were intended to and do work out in actual practice. (R., 18-20)

We suggest that it is arbitrary action under the due process clause of the Fourteenth Amendment to force the Railway, paying all the taxes

proper imposed upon it, to make a special contribution to build roadways for its competitors to use, based on the volume of gasoline consumed by it *on its own private property in four different states.* Again we repeat that appellant Railway pays these charges for gasoline bought in Tennessee and used by it in its motor vehicles on the public highways. (R., 18) It would seem that this phase of the case is covered by *Myles Salt Company* v. *Iberia and St. Mary Drainage Dist.*, 239 U. S. 478, where this court held that when a drainage district, even when created by legislative action, included property—in that case an island—which could not possibly receive any benefit from the drainage scheme, such inclusion (merely to tax that property for the benefit of others) was inconsistent with the Fourteenth Amendment.

We make in essence the same proposition here. The State of Tennessee is providing a roadway for those engaged in the transportation business by motor vehicle. It makes those who use the roads pay in proportion to the use—and all such payments are segregated and devoted solely to highway purposes.

Here we may properly refer to *Turner* v. *Eslick*, 146 Tenn. 236, 246, wherein was involved the validity of an old state statute providing tolls for horsedrawn vehicles, but not for automobiles, wherein the Court said:

> "To require the payment of toll by those traveling in horse-drawn vehicles, and to exempt from the payment of toll those traveling in automobiles, upon a road where all of them have equal rights, would be a discrimination that could not be justified."

To make railroads pay a tax on gasoline consumed on their own private property in interstate railroad operation for the special benefit of highway users seems to us to be that character of arbitrary action condemned by the Fourteenth Amendment.

This court has never undertaken to circumscribe the due process and equality clauses of the Fourteenth Amendment by exact definition. Arbitrary action and unreasonable discrimination have been interdicted but each particular case must stand or fall by the application of general principles to particular facts. At the risk, possibly, of being tedious we quote from a few of the many decisions showing what these general principles are.

In *Lawrence v. State Tax Commission of Mississippi*, 52 S. Ct. 556, 557-559, 286 U. S. 276, this court said:

> "The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those

domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment.

. . . . . .

"The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax, Hattiesburg Grocery Co. v. Robertson, 126 Miss. 34, 88 So. 4, 25 A. L. R. 748; Knox v. Gulf, M. & N. R. Co., 138 Miss. 70, 104 So. 689; but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.

. . . . . .

"But the Constitution, which guarantees rights and immunities to the citizens, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided.

. . . . . .

"The burden does not rest on him to test again the validity of the amendment by some procedure to compel his competitors to pay the tax under the earlier statute.

. . . . . .

> "The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

In *Gregg Dyeing Company* v. *Query*, 52 St. Ct. 631, 635, 286 U. S. 472, this Court said:

> "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries."

*First National Bank of Hartford* v. *Hartford*, 273 U. S. 548, 560, held that state legislation in taxing measures which, regardless of intent, actually discriminated against capital invested in national bank shares was invalid.

In *Pacific Company* v. *Johnson*, 285 U. S. 480, 493, is the following:

> "State taxes which, if non-discriminatory, would be upheld, even though they reach or affect those engaged in interstate commerce, are condemned if they discriminate against those so engaged, by placing on them heavier burdens than those imposed on others within the state."

*Cumberland Coal Co.* v. *Board*, 284 U. S. 23, recognizes the right of a taxpayer, "with due regard to differences in actual value," to be put on a basis of equality with other taxpayers.

From *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 247, we have the following:

> "The petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. Cumberland Coal Co. v. Board of Revision, supra; Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 514-518; Chicago Great Western Ry. Co. v. Kendall, 266 U. S. 94, 98; Sioux City Bridge Co. v. Dakota County, supra. Nor may he be remitted to the necessity of awaiting such action by the state of-

ficials upon their own initiative. Montana National Bank v. Yellowstone County, supra.

"The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them."

So in *Memphis & Charleston Railway Co.* v. *Pace*, 282 U. S. 241, 246, this court said:

"But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, Houck v. Little River District, supra; Valley Farms Co. v. Westchester, supra; and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause."

In *Dane* v. *Jackson*, 256 U. S. 589, 598-599, this court said:

"While the nature of the subject does not permit of much finality of general statement, it may plainly be derived from the cases cited that since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax, it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the States for the purpose of attempting to produce what might be thought to be a more just distribution of the

> burdens of taxation than that arrived at by the state legislatures (4 Pet. 517; 15 Wall. 319, 109 U. S. 400; 185 U. S. 371, supra); and that where, as here, conflict with federal power is not involved, a state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing.' (134 U. S. 237; 173 U. S. 615; 239 U. S. 220, supra.)."

See also such cases as *Thomas* v. *Kansas City Southern Railway*, 261 U. S. 481, 483; *Goldsmith* v. *Prendergast Construction Co.*, 252 U. S. 12, 17; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37-40; *Road Improvement Dist.* v. *Missouri Pacific*, 274 U. S. 188, 194.

(f) Such cases as *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 257, are not inconsistent with our theory here. In that case Pennsylvania provided a tax for anthracite coal which had no counterpart in relation to bituminous coal. To some extent these two kinds of coal were used for the same purposes and those producing the same were in competition so it was claimed that to impose this tax on one kind of coal and not on the other denied that equality of treatment guaranteed by the Fourteenth Amendment. The court, however, put its decision on the ground that

> "The differences between them are a just basis for their different classification; and the differences are great and important. They differ even as fuels; they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel; bituminous coal has other uses. Products of utility are obtained from it."

It will be noted that that tax was justified on the ground of material difference in the constituent elements of the two kinds of coal and of their uses. It will also be noted that there was no challenge to the tax system as a whole which is the primary point we make in this respect.

(g) It is easy to say that in relation to taxation the Fourteenth Amendment merely requires common honesty and fair dealing and that a tax which is palpably arbitrary or unduly discriminatory is invalid. All the trouble comes in the practical application.

We must remember, and it is a matter of common knowledge, that transportation by motor vehicle is in direct and effective competition with the railroads. See *Co-ordination of Motor Transportation*, Docket No. 23400, 182 I. C. C. 263. "The effect of motor-truck competition upon rail carriers is so well known as to require no further discussion here." *Consolidated Southwestern Cases*, 185 I. C. C. 357, 361.

Due to the differences in these two forms of transportation obviously they do not have to be taxed exactly in the same way; but after all common carriers by railroad and common carriers by motor vehicle are fundamentally alike. They are engaged in the same business; they haul the same commodities. The "economic weight" of their respective tax burdens (276 U. S. 245, 251) must be fairly comparable. The trouble is that the railroads must buy, construct and maintain their roadways at their own expense and pay taxes thereon; whereas common carriers by motor vehicle have this done for them by the public out of public funds.

It seems so obvious to us that the charges contained in the statutes here under attack were intended solely as compensation for the use of the highways that we cannot doubt that, even looking only to the "four corners" of these particular statutes, it is arbitrary action and unreasonable discrimination to undertake to make a railroad pay its money to build a public highway for its competitor simply because it burns gasoline on its own private roadway.

Going to the main proposition, however, under the authority of the Gregg case, *supra*, this court may consider the two tax systems as a whole. The contribution of common carriers by motor vehicle to government, included in which is the right to use a highway, bought, built and maintained by the

public, is only five cents out of each dollar of gross revenue; while the railroads in Tennessee pay for, in essence, the same thing nearly seven times as much or 33.21 cents out of each dollar of gross revenue. Allowing for a reasonable twilight zone, this disparity in the tax burdens of these two competing forms of transportation seems to us to be so extreme as to constitute both arbitrary action and unreasonable discrimination. That it burdens interstate commerce by railroad is obvious.

Railroads are entitled to equality of treatment under the law. A comparison of the practical results of the two tax systems of Tennessee applicable to these two competing forms of common carriers shows that they do not get it.

We ask that this cause be reversed.

Respectfully submitted,

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

*Counsel for appellant.*

W. A. MILLER,
S. M. WALKER,
FRANK SLEMONS,
WALTON WHITWELL,
*of Counsel.*

September 30, 1932.

# APPENDIX

## CHAPTER NO. 58, ACTS OF 1923

## HOUSE BILL NO. 525.

(By Mr. Hall.)

AN ACT requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That as used in this Act the term "person" means and includes every individual, firm, association, joint stock company, syndicate and corporation.

The term "distributor" means and includes every person who engages in the business in the State of refining, manufacturing, producing or compounding gasoline or distillate, and selling the same in this State; and also every person who engages in the business in this State of shipping, transporting or importing any gasoline or distillate into, and making original sales of the same, in this State.

The term "dealer" means and includes every person, other than a distributor who engages in the business in this State, of distributing or selling gasoline or distillate within this State.

SEC. 2. *Be it further enacted*, That every distributor shall, for the year 1923, and each year thereafter, when engaged in such business in this State, pay to the State Comptroller, for the exclusive use of the State, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this State, in an amount equal to two cents for each gallon of gasoline, and two cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold by him in this State, or shipped, transported or imported by such distributor into, and distributed or sold by him within this State, during such year; provided, however, that no gasoline or distillate distributed or sold by any such distributor in the original packages in which the same was shipped, transported or imported into this State, shall be included or considered in determining the amount of such privilege tax, but only such gasoline and distillate as has been sold or distributed by such distributor, after the breaking of the original packages in which the same was shipped, transported or imported into this State shall be included or considered in computing the amount of the privilege tax to be paid by such distributor; provided, fur-

ther, that all gasoline and distillate distributed by any distributor to any of its service stations in this State shall be deemed to have been sold, and shall be treated in the same manner as though the same had been sold to dealers or other persons.

SEC. 3. *Be it further enacted*, That every dealer shall for the year 1923, and each year thereafter, when engaged in such business in this State, pay to the State Comptroller, for the exclusive use of the State, a special privilege tax, in addition to all other taxes, for engaging in such business in this State, equal to two cents for each gallon of gasoline and two cents for each gallon of distillate sold or distributed by such dealer in this State during such year. Provided, however, that no gasoline or distillate sold or distributed by such dealer, and which was refined, manufactured, produced or compounded and sold by a distributor in this State, and no gasoline or distillate sold by such dealer which, when purchased by him, other than was contained in containers or packages in which the same was shipped, transported or imported into this State, shall be included or considered in determining the amount of such privilege tax to be paid by such dealer, but only such gasoline and distillate as was shipped, transported or imported into this State, and purchased by such dealer in the original packages in which so shipped, transported or imported into this State, and then resold

by such dealer after the breaking of such original packages by him, shall be included or considered for the purpose of computing the amount of such privilege tax.

SEC. 4. *Be it further enacted*, That such tax shall be paid in quarterly installments for the quarters ending, respectively, March 31st, June 30th, September 30th, and December 31st, in each year, beginning with the quarter ending June 30, 1923, and the amount of such privilege tax becoming due for each quarter shall be paid to the State Comptroller within thirty days after the end of the quarter for which the same is due.

SEC. 5. *Be it further enacted*, That each distributor shall keep a record in such form as the Commissioner of Finance and Taxation shall require, showing the total number of gallons of gasoline and distillate refined, manufactured, produced or compounded and sold by such distributor within this State during each quarter; or showing the total number of gallons of gasoline and distillate shipped, transported or imported into this State by such distributor; the number of gallons thereof sold in this State in the original packages in which shipped, transported or imported into this State; the number of gallons thereof sold in this State by such distributor, after breaking the original packages in which the same was shipped, transported or imported into this State.

Each dealer shall keep a like record showing the total number of gallons of gasoline and distillate sold by him; the number of gallons of gasoline and distillate so purchased, contained in the original containers or packages in which the same was shipped, transported or imported into this State; the number of gallons so purchased, refined, manufactured, produced or compounded and sold in this State, and such other information as the Commissioner of Finance and Taxation may require. All such records shall at all times during the business hours of the day be subject to inspection by the Commissioner of Finance and Taxation, his agents or employes.

SEC. 6. *Be it further enacted*, That each and every distributor must, within thirty (30) days after the quarter ending June 30, 1923, and within thirty (30) days after the end of each following quarter, make out, in duplicate, on forms prescribed by the Commissioner of Finance and Taxation, and deliver to the State Comptroller, a statement showing the total number of gallons of gasoline and distillate refined, manufactured or compounded and sold by him within this State, or, the total number of gallons of gasoline or distillate shipped, transported or imported into this State by such distributor during such quarter; the number of gallons sold in the original package in which shipped; gallons sold in containers or packages other than the original packages in which the same was shipped, transported or imported into this

State, and such other information as the Commissioner of Finance and Taxation may require; and the total amount due to the State of Tennessee as privilege taxes for such quarter.

Each and every dealer must, within thirty (30) days after the quarter ending June 30, 1923, and within thirty (30) days after the ending of each following quarter, make out in duplicate, on forms prescribed by the Commissioner of Finance and Taxation, and deliver to the State Comptroller, a statement showing the total number of gallons of gasoline and distillate sold by such dealer during the quarter, which was purchased by him in the original packages in which the same was shipped, transported or imported into this State; and the total amount due to the State of Tennessee as privilege taxes for such quarter. Such statement shall be signed and verified by the oath of the individual, or individuals, or by the president, vice-president, treasurer, assistant treasurer, or managing agent in this State of the joint stock company, association, syndicate or corporation making the same.

Any distributor or dealer engaged in or carrying on his business at more than one place or location in this State, may include all such places of business and locations in one statement.

The Comptroller shall file one of such statements in his office and shall deliver the duplicate copy

thereof to the Commissioner of Finance and Taxation.

SEC. 7. *Be it further enacted,* That each distributor and each dealer must, within thirty (30) days after the end of each such quarter, and at the same time the statement required by Section 6 of this Act is delivered to the State Comptroller, pay to the State Comptroller, the amount of the privilege tax shown by such statement to be due for the quarter for which the statement is made and filed.

SEC. 8. *Be it further enacted,* That it shall be unlawful for any distributor or dealer to fail, neglect or refuse to make and file any statement required by the provisions of Section 6 of this Act, in the manner, or within the time therein provided, or to make any such statement false in any particular.

SEC. 9. *Be it further enacted,* That if any distributor or dealer shall fail, neglect or refuse to make any statement required by Section 6 of this Act within the time therein provided, the Commissioner of Finance and Taxation shall, immediately after such time has expired, proceed to inform himself as best he may, regarding the matters and things required to be set forth in such statement, and from such information as he may be able to obtain, to make a statement showing such matters and things, and determine and fix the amount of the privilege tax due to the State

from such delinquent distributor or dealer for such quarter, adding to the amount of such privilege tax a penalty of not exceeding fifty per cent (50%) thereof, and deliver such statement to the State Comptroller, who shall proceed to collect the amount of such privilege tax with penalty added thereto, and interest on the whole thereof, at the rate of six (6) per centum per annum from the date of the making of such statement by the Commissioner of Finance and Taxation until paid. Upon request of the State Comptroller it shall be the duty of the Attorney-General to commence and prosecute to final determination, in any court of competent jurisdiction, an action at law to collect the same. No action shall be maintained by any such distributor or dealer to review, revise or change such statement in any particular or to enjoin the collection of the privilege tax, or any part thereof, and such distributor or dealer shall have no right to pay such privilege tax, or any part thereof, under protest, and maintain any action to recover the same.

SEC. 10. *Be it further enacted*, That every distributor selling any gasoline or distillate in this State, in the original packages in which shipped, transported or imported into this State by such distributor, shall at the time of making such sale, make out and deliver to the purchaser thereof, an invoice, in which invoice shall be stated the number of gallons of gasoline or distillate covered by such invoice, and that the same has been sold in

the original packages in which the same was shipped, transported or imported into this State.

SEC. 11. *Be it further enacted,* That none of the provisions of this Act shall apply to the sales of gasoline or distillate when sold for, and exported out of the State.

SEC. 12. *Be it further enacted,* That it shall be the duty of the State Comptroller to collect all taxes accruing under this Act and to issue proper receipts therefor and to pay over all taxes so collected to the State Treasurer, who shall place them to the credit of a fund to be used solely in the construction and maintenance of the Highway System of the State, and no part of said fund shall be used in any other department or for any other purpose whatsoever.

SEC. 13. *Be it further enacted,* That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed; and that this Act take effect on April 1, 1923, the public welfare requiring it.

Passed March 14, 1923.

F. S. HALL,
*Speaker of the House of Representatives.*

EUGENE J. BRYAN,
*Speaker of the Senate.*

Approved March 24, 1923.

AUSTIN PEAY,
*Governor.*

## CHAPTER NO. 67, ACTS OF 1925

## SENATE BILL NO. 398.

### (Evans, Hill, Maiden.)

AN ACT to amend an Act entitled: "An Act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State," being Chapter 58 of the Public Acts of 1923, so as to amend the caption by including the words, "or storing or distributing," after the word "selling" in the third line of the caption of the printed Act as published, and by amending the body of the Act by imposing the tax upon persons, firms, associations, joint stock companies, syndicates and corporations storing or distributing any of the products mentioned in said Act.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That the caption of Chapter 58 of the Public Acts of 1923, being entitled "An Act requiring all persons, firms, associations, joint stock companies, syndicates, and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State," be amended so as to add after the word "selling" and before the word "gasoline," the words "or storing or distributing."

SEC. 2. *Be it further enacted,* That Section 3 thereof be amended by adding at the end thereof the following: "The tax imposed by this Act shall apply to persons, firms, or corporations, dealers or distributors, storing any of the products mentioned in this Act, and distributing the same, or allowing the same to be withdrawn from storage, whether such withdrawal be for sale or other use; provided that "sellers" of gasoline and such substitutes thereof and distillates paying the tax herein provided may continue to pay the same computed and paid on the basis of their sales as hereinbefore required and stores and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

SEC. 3. *Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 10, 1925.

W. F. BARRY,
*Speaker of the House of Representatives.*

L. D. HILL,
*Speaker of the Senate.*

Approved April 13, 1925.

AUSTIN PEAY,
*Governor.*

FILE COPY

OCT 24 19

CHARLES ELMORE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

*Versus*

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

## SUPPLEMENTAL BRIEF ON JURISDICTION ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

FITZGERALD HALL,
*Counsel for appellant.*

SETH M. WALKER,
W. A. MILLER,
FRANK SLEMONS,
WALTON WHITWELL,
*of Counsel*

October 25, 1932.

(File No. 36,873)

# INDEX.


| | PAGE |
|---|---|
| Preliminary statement | 1 |
| Bill of Complaint | 2-4 |
| Defensive Pleadings | 4 |
| Decisions of the Supreme Court of Tennessee | 5 |
| The Statute in question | 5-6 |
| Tennessee decisions construing, interpreting and enforcing the Tennessee Declaratory Judgments Act | 6-13 |
| United States Supreme Court decisions determining what are and what are not "cases" and "controversies" under Article III of the Federal Constitution | 14-30 |
| Brief of argument | 31-35 |
| Appendix I. The Tennessee Declaratory Judgments Act | 36-40 |
| Appendix II. Jurisdiction and power of Chancery Courts in Tennessee | 41 |
| Appendix III. The judiciary article of the Tennessee Constitution | 42 |

## TABE OF CASES CITED.

PAGE

*Cummings* v. *Shipp*, 156 Tenn. 595 ---- 11
*Ex Parte Bakelite Corporation*, 279 U. S. 438, 454 ---- 15
*Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 467-469, 470 ---- 27
*Fidelity National Bank & Trust Co.* v. *Swope*, 274 U. S. 123, 131-132 ---- 17
*Frazier* v. *Chattanooga*, 156 Tenn. 346 ---- 11
*Goetz* v. *Smith*, 152 Tenn. 451, 465 ---- 9
*Harrell* v. *American Home Mortgage Co.*, 161 Tenn. 646, 648 ---- 12
*Hodges* v. *Hamblen County*, 152 Tenn. 395 ---- 9
*In re Cumberland Power Co.*, 147 Tenn. 504 ---- 6
*Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 444 ---- 20
*Lake and wife* v. *McDavitt*, 81 Tenn. (13 Lea.) 26, 30 ---- 41
*Liberty Warehouse Co.* v. *Burley Tobacco Growers*, 276 U. S. 71, 89 ---- 20
*Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, 73-74 ---- 16
*Miller* v. *Miller*, 149 Tenn. 463 ---- 7
*Muskrat* v. *United States*, 219 U. S. 346 ---- 6, 14
*Nashville Trust Co.* v. *Dake*, 162 Tenn. 356, 359 ---- 13
*New Jersey* v. *Sargent*, 269 U. S. 328 ---- 16
*Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U. S. 716, 723-725, 727 ---- 24
*Parmer* v. *Lindsey*, 157 Tenn. 29 ---- 11
*Perry* v. *Elizabethton*, 160 Tenn. 102, 106 ---- 12
*Peters* v. *O'Brien*, 152 Tenn. 466 ---- 9
*Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 700 21
*Sadler v. Mitchell*, 162 Tenn. 363, 367 ---- 13
*Tutun* v. *United States*, 270 U. S. 568, 577 ---- 21
*Tennessee Eastern Electric Co.* v. *Hannah*, 157 Tenn. 582, 587 12
*Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 162 21
*Willing* v. *Chicago Auditorium*, 277 U. S. 274, 288, 289-290 ---- 22
12 A. L. R. 53-92 ---- 29
50 A. L. R. 42-55 ---- 29
68 A. L. R. 110-134 ---- 29

## TABLE OF STATUTES CITED.

Tennessee Constitution, Article VI ---- 6, 32, 41, 42
Tennessee Public Acts, 1923, chapter 29 ---- 2, 5, 30, 31, 32, 36
United States Constitution, Article III ---- 3, 32, 35

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

---

No. 176

---

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

*Versus*

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,

APPELLEES.

---

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

---

## SUPPLEMENTAL BRIEF ON JURISDICTION.

---

MAY IT PLEASE THE COURT:

The appellant, The Nashville, Chattanooga & St. Louis Railway, filed its brief on jurisdiction in this court on July 20, 1932. Then on September 30, 1932, it filed its brief on the merits.

This court in its orders of October 10, 1932, set this cause down for argument, a portion of the journal entry being as follows: "The attention of counsel is invited to the question whether a case or controversy is presented, in view of the nature of the proceedings in the state courts." To this question we address ourselves.

**The bill of complaint.**

The original bill of complaint was filed in the chancery court of Davidson County, Tennessee. (R., 12.) (For the jurisdiction and power of the court see Appendix II, page 41, *infra.*)

The proceeding was under chapter 29 of the 1923 Public Acts of Tennessee known as "The Uniform Declaratory Judgments Act." (R., 13.)

The respondents were the Comptroller of the Treasury, the Commissioner of Finance and Taxation and the Attorney General of the State. (R., 13.)

The suit was brought "to construe said series of statutes to determine whether they require a railroad, such as complainant, to obtain a permit, or to make any bond or bonds, or *to pay any tax* on any gasoline used in railroad operations in Tennessee or elsewhere; and to determine the constitutional validity of said statutes if they be construed as applicable to such a railroad as complainant under the facts hereinafter stated.

*Complainant's rights and obligations under said statutes are now actually in issue as will be hereinafter more fully set forth.*" (R., 28.)

It is thereupon set out that the respondent Comptroller and the respondent Commissioner of Finance and Taxation have in their official capacities, pursuant to their statutory duties, "*called upon complainant to pay to the State of Tennessee*

*privilege taxes alleged to be due* . . . in the sum of Thirteen Thousand, Three Hundred Eighty-one and 23/100 ($13,381.23) Dollars." (R., 14.)

It is further alleged that "respondents have now determined to undertake *to require complainant* to *pay this sum*, and further sums in the future, which sums complainant claims are not legally due, *and the question at issue is whether such sums are due, or not*, and this calls for a construction of said statutes and of a determination of their validity. . . ." (R., 14.)

The bill thereupon proceeds to set out the facts, which we have elaborated on in our brief of September 30, 1932, on the merits.

The prayer of the bill is as follows:

> "Premises considered, Complainant asks leave to file this bill in this Honorable Court; that the parties named herein as respondents be made such by the service of process compelling them, and each of them to appear at an early rule day of this Court to answer this bill, but not under oath, answer under oath being expressly waived. (R., 23.)
>
> "Complainant prays that the Court determine and declare whether it is obligated to obtain any permit or make any bond or comply with any of the other administrative provisions of said series of statutes; and further that the Court determine and declare whether gasoline temporarily stored in complainant's

shops at Nashville, Tennessee, both that actually used and consumed in railroad operations in Tennessee and that actually used and consumed in railroad operations in the States of Kentucky, Alabama and Georgia, comes within the purview of any of the administrative or other provisions of this series of statutes. (R., 28-29.)

"Complainant further prays that said Chapter 58 of the 1923 Acts of Tennessee, and the statutes amendatory thereof, be construed to determine whether they apply to such an interstate carrier as complainant, and if so, to determine their validity under the facts and circumstances as hereinbefore set out. (R. 23.)

"Complainant specificially prays that said Chapter 58 of the 1923 Public Acts, as amended, be held invalid to the extent that it may apply to gasoline used by complainant in the operation of its railroad, on the grounds and for the reasons hereinabove set forth. (R., 23.)

"Complainant further prays for such other, further and general relief as it may be entitled to in the premises." (R., 23.)

### Defensive pleadings.

The respondents filed a demurrer setting forth various grounds of defense, among others, claiming that the exclusive remedy of the Railway was to pay the tax in question under protest and sue to recover. (R., 29.)

### Decisions of the Supreme Court of Tennessee.

The Supreme Court of Tennessee took jurisdiction of the controversy and decided the case on its merits, specifically holding that, as the Railway's challenge to these state statutes under the Federal Constitution was not sound, the obligation to pay as demanded was fixed and binding. (R., 7, 11.)

In the second opinion the Court said:

> "In the memorandum opinion filed April 30, the court affirmed the decree of the Chancellor in which he held *defendant liable for the privilege tax imposed* upon the storage of gasoline in the state." (R., 11.)

### The statute in question.

For the convenience of the court chapter 29 of the 1923 Public Acts of Tennessee is copied in full in the appendix, page 36, *infra.*

Section 1 provides in part:

> "That courts of record within their respective jurisdictions shall have the power to declare rights . . . The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree."

Section 2 provides in part:

> "That any person . . . whose rights . . . are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute, . . ."

Section 5 provides that sections 2, 3 and 4 are not intended to limit the general powers conferred in section 1 "in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."

Section 7 provides that "All orders, judgments and decrees under this Act may be reviewed as other orders, judgments and decrees."

Section 9 authorizes trial of issues of fact by jury.

Section 11 requires that all persons with any interest should be made parties, and that, if a statute be attacked as unconstitutional, the Attorney General of the State shall be served with process.

Tennessee decisions construing, interpreting and enforcing the Tennessee Declaratory Judgments Act.

(a) The Constitution of Tennessee limits the jurisdiction of the Tennessee Supreme Court to actual controversies very much in the same way and to the same extent as article III of the Constitution of the United States does the Supreme Court of the United States. (See Appendix III, page 42, *infra*). The Tennessee Supreme Court has strictly construed its powers, citing and relying on such cases as *Muskrat* v. *United States*, 219 U. S., 346. See *In re Cumberland Power Co.*, 147 Tenn., 504.

(b) The Tennessee Declaratory Judgments Act came before the Tennessee Supreme Court for the

first time in *Miller* v. *Miller*, 149 Tenn., 463, and the question was raised whether proceedings under this Tennessee statute constituted such cases and controversies as invoked a proper exercise of the judicial function of the court. The Muskrat case, *supra*, is referred to and quoted at large. Other cases discussing what is meant by "judicial power" were referred to, the court saying in part as follows:

> "In *Muskrat* v. *United States*, *supra*, and the other decisions of the Supreme Court of the United States relied on by the majority in the Anway Case to support its holding that the act there involved was unconstitutional, no actual controversy existed between the opposing parties. An examination of the federal Constitution (article 3, section 2) discloses that the judicial power of the court is limited to cases and controversies. Therefore we do not think that the case of *Muskrat* v. *United States*, and the other federal decisions cited in the majority opinion in the Anway Case, are controlling in the instant cause.
>
> "Without further elaboration, we are of the opinion that the act under consideration does not violate any provision of our constitution, and is therefore a valid statute.
>
> "As to the necessity of a bona fide controversy as to which the judgment will be *res judicata*, it was announced in *Russian Commercial & I. Bank* v. *British Bank* (Eng.), reported in 19 A. L. R., 1101, that the rule in Scotland, where the action of declarator has existed for hundreds of years, is that the question must be a real, and not a theoretical, ques-

tion; the person raising it must have a real interest to raise it; he must be able to secure the proper contradicter, that is to say, some one presently existing who has a true interest to oppose the declaration sought." (484-485.)

. . . . . .

"In the court of appeal, Lord READING, C. J., referring to *Guaranty Trust Co.* v. *Hannay*, reported in 12 A. L. R. 1, said:

" 'I think the plaintiffs were interested in the subject-matter, as were also the defendants. I find no authority which would preclude the court from making the declaration. Indeed, in both decisions relied upon, I find support for the proposition that in an exceptional case where it is reasonably necessary for the purpose of doing justice, and where the declaration is sought by a party who is interested in the subject-matter of the litigation, the court could and should make the order. . . .'

"It follows, therefore, from the foregoing authorities, that the only controversy necessary to invoke the action of the court and have it to declare rights under our declaratory judgment statute is that the question must be real, and not theoretical; the person raising it must have a real interest, and there must be some one having a real interest in the question who may oppose the declaration sought. It is not necessary that any breach should be first committed, any right is invaded, or wrong done. The purpose of the act, as expressed in section 12 thereof, is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'

> "The court may, however, refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." (486-487.)

(c) In *Goetz* v. *Smith*, 152 Tenn., 451, 465, the Tennessee Supreme Court declined to pass on certain questions presented in a suit under the Tennessee Declaratory Judgments Act, saying:

> "In the present litigation there is no one before the court adversely affected by such provisions of the act, and no one who has any real interest to raise such questions under the Declaratory Judgments Statute. A declaration upon these matters will, therefore, not be made."

(d) In *Peters* v. *O'Brien*, 152 Tenn., 466, the Tennessee Supreme Court held that the Attorney General of the State was a proper party in certain proceedings under the Tennessee Declaratory Judgments Act.

(e) In *Hodges* v. *Hamblen County*, 152 Tenn., 395, the Tennessee Supreme Court declined to consider, under the Tennessee Declaratory Judgments Act, questions that were not active controversies between parties with antagonistic interests, saying in part:

> "In *Miller* v. *Miller*, 149 Tenn., 463, 261 S. W., 965, this court adopted the Scotch rule with reference to the action of declarator,

long prevailing in that jurisdiction, referred to in *Russian Commercial & I. Bank* v. *British Bank* (House of Lords), 19 A. L. R., 1101, and held that to justify a declaration 'the question must be a real, and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure the proper contradicter, that is to say, some one presently existing who has a true interest to oppose the declaration sought.'

"*The questions here submitted do not meet this test. They are purely theoretical.** The full membership of the county court of Hamblen county has qualified, and is attending the sessions of that tribunal. Now that the eight magistrates, who delayed their qualification, have assumed the duties of office, it is improbable they will neglect such duties and absent themselves from the meetings of the court. The ten complainants have no real interest in a declaration of their power, apart from other members of the court, to transact business for the court, since the other members are participating in the court's deliberations. The statute does not contemplate declarations upon remote contingencies.

"In other words, the questions submitted arise out of a closed incident. The ten complainants attempted no official action during the filibuster, and the validity of no action or probable action of theirs or others is involved. A declaration from us, therefore, could only serve as an expression upon a supposititious dispute. Moreover, it would be a declaration upon a question in which, if it ever does arise, the particular parties now before the court may have no interest whatever—a question purely abstract and theoretical.

*All italics ours.

"The practice of rendering declaratory judgments has been in vogue in England and Scotland for many years, but we find no case that would justify us in going to the lengths that we are here asked to proceed.

"Parties are not entitled to an expression of opinion to help them in another transaction. *Barwick* v. *Southeastern & Co. R. Co.*, (1921) 1 K. B., 187.

"A declaration should not be made on an abstract question. *Gray* v. *Spyer* (1921), 2 Ch., 549.

"Nor on remote and incidental questions. *In re Toronto R. Co.* (1920), 48 Ont. L. Rep., 319.

"For the reasons stated, this appeal must be dismissed." (398-400.)

(f) In *Frazier* v. *Chattanooga*, 156 Tenn., 346, the court recognized that the word "declaration" in the Tennessee Declaratory Judgments Act was substantially the equivalent of an ordinary decree in a chancery proceeding.

(g) In *Cummings* v. *Shipp*, 156 Tenn., 595, the Tennessee Supreme Court held that there could be no proceedings under the Tennessee Declaratory Judgments Act unless there were real parties before the court with direct and adverse interests in the subject matter to be determined.

(h) In *Parmer* v. *Lindsey*, 157 Tenn., 29, the decree in a proceeding under the Tennessee Declaratory Judgments Act fixed the liability of the several complainants to pay privilege taxes.

(i) In *Tennessee Eastern Electric Co.* v. *Hannah*, 157 Tenn., 582, 587, the jurisdiction of the court under the Tennessee Declaratory Judgments Act was challenged and that court held that it had jurisdiction, saying:

> "Parties representing real interests were thus arrayed on both sides of a substantial controversy."

(j) In *Perry* v. *Elizabethton*, 160 Tenn., 102, 106, the court declined to take jurisdiction in a suit under the Declaratory Judgments Act, saying in part:

> "To authorize a taxpayer to maintain a suit under the Declaratory Judgments Law, to determine the constitutionality of a charter provision of a municipal government, he must have a 'real interest' in the subject of the litigation, and this real interest is in nowise different from that which he must have to enjoin a proposed municipal action on the ground of illegality. We see no ground for any distinction in the interest which would authorize the one suit from the interest which is necessary to the other.
>
> "It results that the appellant fails to show himself entitled to maintain his bill, and appeal, both because of an absence of sufficient interest in the litigation and because of an absence of parties possessing adverse interest."

(k) In *Harrell* v. *American Home Mortgage Co.*, 161 Tenn., 646, 648, the court declined to take

jurisdiction of a proceeding under the Tennessee Declaratory Judgments Act, saying "Quite obviously without the necessary parties before the Court no declaratory judgment or decree may be had."

(l) In *Nashville Trust Company* v. *Dake*, 162 Tenn., 356, 359, the court, referring to the Tennessee Declaratory Judgments Act, said: "The Court will not declare future rights, or decide upon and determine contingencies which may or may not ever arise."

(m) In *Sadler* v. *Mitchell*, 162 Tenn., 363, 367, the court declined to pass on certain questions under the Tennessee Declaratory Judgments Act because certain proper parties were not before the court. That "declarations" under this statute are not merely advisory is demonstrated by the following portion of the opinion in this cause, to-wit:

> "*Since a declaration under the statute has the force and effect of a final judgment* or *decree*, we think we should no more make a declaration against this foreign administratrix than we would render a decree against her with respect to the distribution of the estate."

**United States Supreme Court decisions determining what are and what are not "cases" and "controversies" under Article III of the Federal Constitution.**

(a) In *Muskrat* v. *United States*, 219 U. S., 346, (a case consistently followed, as shown *supra*, by the Tennessee Supreme Court) this court defined its judicial power in the following words:

> "As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.
>
> What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'? A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury* v. *Madison*, 1 Cranch, 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *In re Pacific Railway Commission*, 32 Fed. Rep., 241, 255. Of these terms that learned Justice said:
>
> 'The judicial article of the Constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall., 431, 432; 1 Tuck. Bl. Comm. App., 420, 421. By cases and controversies are intended the

> claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.' " (356-357.)

Further on the court says:

> "That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction . . . (361). It is true the United States is made a defendant to his action, but it has no interest adverse to the claimants." . . . (361.) Such judgment will not conclude private parties, when actual litigation brings to court the question of the constitutionality of such legislation." (362.)

(b) In *Ex Parte Bakelite Corporation*, 279 U. S., 438, 454, there was a discussion by this court of the difference in jurisdiction between constitutional and legislative courts, wherein it was said, among other things: "A duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under Article III."

(c) In *New Jersey* v. *Sargent*, 269 U. S., 328, the State of New Jersey filed a suit against the Attorney General of the United States and the members of the Federal Power Commission to obtain a judicial declaration as to the constitutional validity of certain portions of the Federal Water Power Act. A motion was made to dismiss the case on the ground that no judicial controversy was presented. The bill failed to show any right of the State of New Jersey, which was, or was about, to be adversely affected by the enforcement of said Federal statute. This Court dismissed the bill on the ground that the only thing sought was an academic determination of the validity of certain portions of a federal act.

(d) In *Liberty Warehouse Company* v. *Grannis*, 273 U. S., 70, 73-74, a proceeding was instituted in the United States District Court for the Eastern District of Kentucky, under the Kentucky Declaratory Judgment Law. This Court affirmed the judgment below, dismissing the petition for want of jurisdiction, saying in part:

> "The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope. While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, *there is no*

*semblance of any adverse litigation with him individually;* there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights, nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective. And no relief of any kind is prayed against him, by restraining action on his part or otherwise.

"The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court." (73-74.)

(e) In *Fidelity National Bank & Trust Company* v. *Swope*, 274 U. S., 123, 131-132, 133-134, there was involved the question as to whether the controversy was of that character which the Supreme Court of the United States under Article III of the Constitution would take jurisdiction, this court saying in part:

"That this proceeding authorized by Sec. 28 of the Kansas City charter was judicial in character appears from an inspection of the statute and the record in the circuit court. The proposed improvement having been authorized, the benefit district established, the estimated cost ascertained, all by action of the city council or the board of public works essentially legislative in character, the jurisdiction of the state court was invoked in an

adversary proceeding to determine the validity of the liens imposed or to be imposed under the ordinance. That court is a court of general jurisdiction, having plenary power to determine all questions arising under the state law or the laws and Constitution of the United States. Section 2436 Mo. Rev. Stat. 1919; *Schmelzer* v. *Kansas City*, 295 Mo., 322. These questions are required to be determined in a trial in accordance with the laws and constitution of the State. The sole duty and power of the court is to pass upon questions of law and to inquire judicially into the facts so far as necessary to ascertain the applicable rules of law. See *Keller* v. *Potomac Elec. Co.*, 261 U. S., 428, 440. Under this procedure, the judgment to be awarded finally determines, subject to appeal, the validity of the ordinance authorizing the improvement, the limits of the benefit district, the method of apportioning benefits, and the validity of the proposed liens. That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned. Compare *Risty* v. *Chicago, R. I. & Pac. Ry. Co., supra.* They cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city. We do not think significant the fact that under Sec. 28 the city might pay, though it did not, a part of the cost of the improvement and that the council, in authorizing the special tax, is required to deduct from the estimated cost the

amount which may be paid by the city. These provisions could not restrict the authority or capacity of the court to pass upon the validity of the benefit district and the special tax actually authorized by the ordinance.

While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. (131-132.)

. . . . . .

The present statute admits of no such construction. The proceeding is in terms directed to be "against the respective owners of land chargeable under the provisions of this section with the cost of such work," and the specific issue to be determined by the judgment of the court is whether or not the respective tracts in the benefit district shall be charged with the lien as provided by the ordinance. The court is directed to render judgment "either validating such ordinance, and proposed lien against the lots, . . . within said benefit district or against such lots, . . . as the court may find legally chargeable, . . . or the court may render judgment that such ordinance or proposed lien are, in whole or in part, invalid and illegal." The plain effect of these provisions is to authorize the court to examine and determine the validity and effect of the legislative action in establishing the benefit district. The result of the proceeding is to establish judicially as against the property owners in the district the validity of such action and of the liens established or to be estab-

lished conformably to the statute on the specific property described.

The issues presented and the subject matter are such that the judicial power is capable of acting upon them. There is no want of adverse parties necessary to the creation of a controversy as in *Muskrat* v. *United States*, 219 U. S., 346. The judgment is not merely advisory as in *Liberty Warehouse Co.* v. *Grannis*, 273 U. S., 70; *New Jersey* v. *Sargent*, 269 U. S., 328; *Fairchild* v. *Hughes*, 258 U. S., 126; *Massachusetts* v. *Mellon*, 262 U. S., 447; *Texas* v. *Interstate Commerce Commission*, 258 U. S., 158, 162. It operates to determine judicially the legal limits of the benefit district and to define rights of the parties in lands specifically described in the pleadings. So far as it affects owners of land in the benefit district who are citizens of other states, the controversy is a "suit" which may be removed to the federal courts. Jud. Code, Sec. 28; *Road District* v. *St. Louis Southwestern Ry.*, 257 U. S., 547.

That the judgment is binding on the parties and their privies and hence not open to collateral attack would seem to be the only reasonable construction of the statute if that question were for us to decide." (133-134.)

(f) In *Liberty Warehouse Company* v. *Burley Tobacco Growers*, 276 U. S., 71, 89, it was held that "this Court has no jurisdiction to review a mere declaratory judgment."

(g) In *Keller* v. *Potomac Electric Power Co.*, 261 U. S., 428, 444, there was involved the power of the Congress to invest this court with certain

legislative functions. In holding that there was no such power the following was said:

> "Such legislative or administrative jurisdiction, it is well settled can not be conferred on this Court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in *Muskrat* v. *United States*, 219 U. S., 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court without real parties or a real case, or to administrative or legislative issues or controversies."

See, also, *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S., 693, 700.

(h) Judicial action, which may be the subject of litigation in this court, may be invoked not only in cases involving property and property rights but mere status. See *Tutun* v. *United States*, 270 U. S., 568, 577.

(i) In *Texas* v. *Interstate Commerce Commission*, 258 U. S., 158, 162, this court said:

> "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power."

(j) In *Willing* v. *Chicago Auditorium*, 277 U. S., 274, 288, 289-290, this Court held that relief by mere declaratory judgment is beyond the jurisdiction of the federal judiciary, saying in part:

> "There is not in the bill, or in the evidence, even a suggestion that any of the defendants had ever done anything which hampered the full enjoyment of the present use and occupancy of the demised premises authorized by the leases. *There was neither hostile act nor a threat.* . . ." (288.)
>
> "What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary. *Liberty Warehouse Co.* v. *Grannis*, 273 U. S., 70, 74. Compare *Liberty Warehouse Co.* v. *Burley Tobacco Growers Assn.*, 276 U. S., 71. The statement, made at the bar, that *Blair* v. *Chicago*, 201 U. S., 400, 450, supports the jurisdiction, is unfounded.
>
> "It is true that this is not a moot case, like *Singer Manufacturing Co.* v. *Wright*, 141 U. S., 696, and *United States* v. *Alaska S. C. Co.*, 253 U. S., 113; that, unlike *Keller* v. *Potomac Electric Co.*, 261 U. S., 428, 444, and *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S., 693, the matter which it is here sought to have determined is not an adminis-

trative question; that the bill presents a case which, if it were the subject of judicial cognizance, would in form come under a familiar head of equity jurisdiction; that, unlike *Gordon* v. *United States*, 117 U. S., 697, a final judgment might be given; that, unlike *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U. S., 300, the parties are adverse in interest; that, unlike *Fairchild* v. *Hughes*, 258 U. S., 126, and *Massachusetts* v. *Mellon*, 262 U. S., 447, there is here no lack of a substantial interest of the plaintiff in the question which it seeks to have adjudicated; that, unlike *New Jersey* v. *Sargent*, 269 U. S., 328, the alleged interest of the plaintiff is here definite and specific; and that there is here no attempt to secure an abstract determination by the court of the validity of a statute, as there was in *Muskrat* v. *United States*, 219 U. S., 346, 361, and *Texas* v. *Interstate Commerce Commission*, 258 U. S., 158, 162. But still the proceeding is not a case or controversy within the meaning of Article III of the Constitution. The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action. No defendant has wronged the plaintiff or has threatened to do so. Resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution and for more than half a century thereafter, *Cross* v. *De Valle*, 1 Wall., 1, 14-16. Compare *Jackson* v. *Turnley*, 1 Drew, 617, 627; *Rooke* v. *Lord Kensington*, 2 K. & J. 753, 760; *Lady Langdale* v. *Briggs*, 8 DeG. M. & G., 391, 427.

"As the proceeding is not a suit within the meaning of Sec. 28 of the Judicial Code, the motions to remand the cause of the state court should have been granted." (289-290.)

(k) In *Old Colony Trust Company* v. *Commissioner of Internal Revenue*, 279 U. S., 716, 723-725, 727, there was involved the question as to whether the review of a decision of the Board of Tax Appeals presented a "case or controversy," under Article III of the Federal Constitution. In holding that this was a justiciable case this court said in part:

"It is not necessary that the proceeding to be judicial should be one entirely *de novo;* it is enough that, before the judgment which must be final has been invoked as an exercise of judicial power, it shall have certain necessary features. What these are has been often declared by this Court. Perhaps the most comprehensive definitions of them are set forth in *Muskrat* v. *United States*, 219 U. S., 346, 356, where this Court entered into the inquiry what was the exercise of judicial power as conferred by the Constitution. There was cited there a definition by Mr. Justice Field, in *Re Pacific Railway Commission*, 32 Fed., 241, 255, which has been generally accepted as accurate. He said:

'The judicial article of the Constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter; and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall.,

431, 432; 1 Tuch. Bl. Comm. App., 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.'

In *Osborn* v. *United States Bank*, 9 Wheat., 738, Chief Justice Marshall construed Article III of the Constitution as follows (p. 819):

'This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.'

The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in the *Bakelite* case, *supra*, and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.

In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. The courts are either the Circuit Court of Appeals or the District of Columbia Court of Appeals. The subject matter of the controversy is the amount of the tax claimed to be due or refundable and its validity, and the judgment to be rendered is a judicial judgment.

The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.

It is next suggested that there is no adequate finality provided in respect to the action of these courts. In the first place, it is not necessary, in order to constitute a judicial judgment that there should be both a determination of the rights of the litigants and also power to issue formal execution to carry the judgment into effect, in the way that judgments for money or for the possession of land usually are enforced. A judgment is sometimes regarded as properly enforceable through the executive departments instead of through an award of execution by this Court, where the effect of the judgment is to establish the duty of the department to enforce it. *La*

> *Abra Silver Mining Co.* v. *United States*, 175 U. S., 423, 457, 461. The case of *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U. S., 123, 132, shows clearly that there are instances where the award of execution is not an indispensable element of a constitutional case or controversy. In that decision there are collected familiar examples of judicial proceedings resulting in a final adjudication of the rights of litigants without it. (723-725.)
>
> . . . . . .
>
> The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest and demonstrates the unsoundness of the objection." (727.)

(1) In *Federal Radio Commission* v. *General Electric Co.*, 281 U. S., 464, 467-469, 470, this Court held that it had no power under Article III of the Federal Constitution to give a mere advisory decision, saying in part:

> "We think it plain from this resume of the pertinent parts of the act that the powers confided to the commission respecting the granting and renewal of station licenses are purely administrative and that the provision for appeals to the Court of Appeals does no more than make that court a superior and revising agency in the same field. The court's province under that provision is essentially the same as its province under the legislation which up to a recent date permitted appeals to it from administrative decisions of the Commissioner of Patents. Indeed, the provision in the act of 1927 is patterned largely

after that legislation. And while a few differences are found, there is none that is material here.

"Referring to the provisions for patent appeals this Court said in *Butterworth* v. *Hoe*, 112 U. S., 50, 60, that the function of the court thereunder was not that of exercising ordinary jurisdiction at law or in equity, but of taking a step in the statutory proceeding under the patent laws in aid of the Patent Office. And in *Postum Cereal Company* v. *California Fig Nut Company*, 272 U. S., 693, 698, which related to a provision for a like appeal in a trade-mark proceeding, this Court held: 'The decision of the Court of Appeals under Section 9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes.' Another case in point is *Keller* v. *Potomac Electric Power Co.*, 261 U. S., 428, 442-444, which involved a statutory proceeding in the courts of the District of Columbia to revise an order of a commission fixing the valuation of the property of a public utility for future rate-making purposes. There this Court held that the function assigned to the courts of the District in the statutory proceeding was not judicial in the sense of the Constitution, but was legislative and advisory, because it was that of instructing and aiding the commission in the exertion of power which was essentially legislative.

"In the cases just cited, as also in others, it is recognized that the courts of the District

of Columbia are not created under the judiciary article of the Constitution but are legislative courts, and therefore that Congress may invest them with jurisdiction of appeals and proceedings such as have been just described.

"But this Court cannot be invested with jurisdiction of that character, whether for purposes of review or otherwise. It was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative. . . . (467-469.)

"Our conclusion is that the proceeding in that court was not a case or controversy in the sense of the judiciary article, but was an administrative proceeding, and therefore that the decision therein is not reviewable by this Court." (470.)

(m) Approximately half of the states now have these declaratory judgment acts. They are not all worded alike. In some instances mere advisory opinions are given. *In others, as in Tennessee, there must be real issues, real parties, and the declaration is the equivalent of a decree which finally settles the point or points at issue.* In the notes to A. L. R. there are long and interesting discussions of these various statutes. See 12 A. L. R., 53-92; 50 A. L. R., 42-55; 68 A. L. R., 110-134.

From an inspection of some of these statutes as construed by their state courts it will be readily seen that they differ widely from the Tennessee Declaratory Judgments Act as construed by the Tennessee Supreme Court.

The bill of complaint had adverse parties, with direct and adverse interests. *The respondent public officials, acting under statutory power called on the Railway to pay a fixed sum as taxes already due.* The Railway denied this obligation on the ground that the statutes imposing the taxes were either not applicable to it or if applicable invalid. ". . . the question at issue is whether such sums are due or not. . . ." (R., 14.)

The prayer of the bill calls for process as in ordinary judicial proceedings. Answer was required. Process was served. (R., 27.)

In other words, in this case a citizen and a taxpayer has been formally called on by the proper public officials to pay taxes alleged to be due now. The taxpayer denies liability. *Suit is brought to determine that liability.* The question is not an academic one; the amount involved is fixed and certain; the demand to pay has been made; and the question at issue is whether payment is legally due. The taxpayer filed a bill and the public officials obligated by law to collect are made respondents. Process is served in the ordinary way. *The court is asked to determine whether the Railway owes the tax actually claimed or not. And the Tennessee Supreme Court decided that question.* (R., 11.)

We have shown that the Tennessee Declaratory Judgments Act by its own words provides for the

determination of rights, and that this may be done by a declaration either in the affirmative or negative. Further, that the *judgment or decree will terminate the controversy.* Trials by jury may be had under the Act and issues of law and fact both are thus finally determined.

The Tennessee Supreme Court has powers under the Tennessee Constitution fairly comparable in this respect to the powers of this court under the Federal Constitution. See page 6, *supra.*

In construing this Declaratory Judgments Act the Tennessee Supreme Court declines to merely give advice. It will not take jurisdiction unless actual parties—and all of them—are before the court representing direct and adverse interests on actual as distinguished from academic issues. Quotations from these cases have been set forth at large from pages 6 to 14, *supra.* There is no federal case where the situation is as actually presented here where this court has declined to take jurisdiction. There is existing an actual and acute controversy. *A tax gatherer proceeding under the law has demanded that a citizen pay a specific sum as taxes based on past facts.* That citizen denies its obligation to pay and suit is filed to have determined the legal obligation to pay (R., 14)—and this certainly under all the decisions is a justiciable question.

There is no doubt that the proper parties are before the court—the proposed taxpayer on the

one hand and the officially designated tax gatherers on the other.

This is no academic dispute. The amount involved has been fixed on the basis of past facts and *demand to pay* has been made. (R., 14.)

Decisions of the Tennessee Supreme Court above quoted show the diligence of that court in avoiding giving mere advisory opinions. It requires, always, as in the instant case, an actually present controversy, with all the proper adverse parties before the court, and when decision is made it is final and further proceedings are not necessary.

Jurisdiction cannot be denied on the theory that the action of the state courts was legislative because these courts were not, as in a rate case, preparing for the future but, on the contrary, they were to determine—and did determine (R., 11)—on the basis of past facts, the present liability of a corporation to pay taxes in a fixed and definite amount which had been formally demanded by the official tax gatherer. (R., 14.)

Nor can jurisdiction be denied on the theory that the procedure in this cause was administrative—the question was whether the Railway owed as taxes a specific sum of money formally demanded by the official tax collector. (R., 14.) *The liability of a citizen to presently pay taxes officially demanded is certainly a judicial question.*

This is neither a moot nor academic case—there has been a formal demand by the duly authorized public officials, acting pursuant to law, upon the Railway to pay taxes to the State of Tennessee in the sum of $13,381.23 (R., 14), and the Railway must pay unless this court holds that the Tennessee statutes imposing these taxes violate, as to the Railway, the Federal Constitution.

The judgment invoked in these proceedings was not advisory; on the contrary the judgment settled an actual controversy between adverse interests properly before the court and the judgment finally determined existing rights and obligations. Pursuant to that judgment, affirmed by the Supreme Court of Tennessee, this Railway must actually pay taxes on the basis of past transactions unless this court holds the taxing statutes to be invalid as claimed by the Railway.

The decision of the Tennessee Supreme Court in this cause which we ask to be reviewed is now the law of Tennessee binding on all taxpayers and all tax gatherers to which the statutes under attack are applicable. *The Railway's obligation to pay a specific sum, to-wit, $13,381.23, as taxes, has been finally determined unless this court gives it relief.* (R., 11.)

We respectfully submit that this is a proceeding over which this court under the judiciary article of the Federal Constitution has jurisdiction.

Respectfully submitted,

*Counsel for appellant.*

SETH M. WALKER,
W. A. MILLER,
FRANK SLEMONS,
WALTON WHITWELL,
*of Counsel*

October 25, 1932.

# APPENDIX.

## TENNESSEE PUBLIC ACTS, 1923.

### CHAPTER NO. 29

### HOUSE BILL NO. 82.

(By Mr. Cooper.)

AN ACT concerning and regulating declaratory judgments and decrees and to make uniform the law relating thereto.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

SEC. 2. *Be it further enacted*, That any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise

and obtain a declaration of rights, status or other legal relations thereunder.

SEC. 3. *Be it further enacted,* That a contract may be construed either before or after there has been a breach thereof.

SEC. 4. *Be it further enacted,* That any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que* trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

SEC. 5. *Be it further enacted,* That the enumeration in Sections 2, 3 and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree

he controversy or remove an un-

*further enacted*, That the court
nder or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

SEC. 7. *Be it further enacted*, That all orders, judgments and decrees under this Act may be reviewed as other orders, judgments and decrees.

SEC. 8. *Be it further enacted*, That further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

SEC. 9. *Be it further enacted*, That when a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

SEC. 10. *Be it further enacted*, That in any proceeding under this Act the court may make such award of cost as may seem equitable and just.

SEC. 11. *Be it further enacted*, That when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard.

SEC. 12. *Be it further enacted*, That this Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be literally construed and administered.

SEC. 13. *Be it further enacted*, That the word "person," wherever used in this Act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

SEC. 14. *Be it further enacted*, That the several sections and provisions of this Act except Sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or

will terminate the controversy or remove an uncertainty.

SEC. 6. *Be it further enacted*, That the court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

SEC. 7. *Be it further enacted*, That all orders, judgments and decrees under this Act may be reviewed as other orders, judgments and decrees.

SEC. 8. *Be it further enacted*, That further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

SEC. 9. *Be it further enacted*, That when a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

SEC. 10. *Be it further enacted*, That in any proceeding under this Act the court may make such award of cost as may seem equitable and just.

SEC. 11. *Be it further enacted*, That when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard.

SEC. 12. *Be it further enacted*, That this Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be literally construed and administered.

SEC. 13. *Be it further enacted*, That the word "person," wherever used in this Act, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

SEC. 14. *Be it further enacted*, That the several sections and provisions of this Act except Sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or

feature thereof shall not effect or render the remainder of the Act invalid or inoperative.

SEC. 15. *Be it further enacted*, That this Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it and to harmonize, as far as possible, with Federal laws and regulations on the subject of declaratory judgments and decrees.

SEC. 16. *Be it further enacted*, That this Act may be cited as the Uniform Declaratory Judgments Act.

SEC. 17. *Be it further enacted*, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed February 9, 1923.

F. S. HALL,
*Speaker of the House of Representatives.*

EUGENE J. BRYAN,
*Speaker of the Senate.*

Approved February 16, 1923.

AUSTIN PEAY,
*Governor.*

# APPENDIX II.

## JURISDICTION AND POWER OF CHANCERY COURTS IN TENNESSEE.

Section 6088 of Thompson's Shannon's Code, which was section 4279 of the Code of Tennessee, is as follows:

"The Chancery Court shall continue to have all the powers, privileges and jurisdiction properly and rightfully incident to a court of equity by existing laws."

Construing this section of the statute and defining the power and jurisdiction of a court of chancery, this court in Lake and Wife v. McDavitt, 81 Tenn. (13 Lea) 26, 30 said:

"It possesses, except where changed by statute, the jurisdiction which was exercised by the Lord Chancellor of England, as an equity judge, denominated his extraordinary jurisdiction."

# APPENDIX III.

## CONSTITUTION OF THE STATE OF TENNESSEE.

### *Article VI.*

SECTION 1. The judicial power of this State shall be vested in one Supreme Court, and such Circuit, Chancery and other inferior courts as the legislature shall from time to time, ordain and establish; in the judges thereof, and in justices of the peace. The legislature may also vest such jurisdiction in corporation courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established.

FILE COPY

FILED
NOV 25
CHARLES ELMORE

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

---

No. 176

---

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

APPELLANT,

*Versus*

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,

APPELLEES.

---

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

---

## BRIEF ON BEHALF OF ROY C. WALLACE, ET AL., DEFENDANTS

---

R. H. BEELER,
*Attorney-General of the State of Tennessee.*

W. F. BARRY, JR.,
*Assistant Attorney-General.*

EDWIN F. HUNT,
*Assistant Attorney-General.*

# INDEX.


PAGE

Jurisdiction of this Court ---------- 1-14

Summary of argument concerning jurisdiction---------- 15-17

Validity of gasoline taxing statutes ---------- 18-59

Federal questions involved ---------- 18

Propositions of law relied upon ---------- 19-23

Argument concerning validity of statutes ---------- 24-59

I. The statutes impose a privilege tax upon the storage of gasoline and not merely upon the gasoline business ---------- 24-27

II. The construction of a state statute by the highest court of the state is binding upon this Court------- 28

III. The power of the Legislature of Tennessee to tax privileges is not limited by the State Constitution-- 29-30

IV. A state may tax the storage of gasoline which has moved in interstate commerce after it has reached its destination ---------- 31-34

V. A state may tax the storage of gasoline, notwithstanding such gasoline is intended for use in interstate commerce ---------- 35-48

VI. The statutes in question impose a privilege tax and not a charge for the use of the state highways---- 49-53

VII. Railroads and motor vehicles constitute different classes of common carriers which need not be taxed in the same manner nor equally ---------- 54-59

## TABLE OF CASES CITED.

PAGE

*American Steel & Wire Co.* v. *Speed*, 192 U. S. 500 ..... 21, 32, 39
*Arizona* v. *California*, 283 U. S. 423 ..... 13
*Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96 ..... 23, 55
*Bacon* v. *Illinois*, 227 U. S. 504 ..... 38
*Bank* v. *Senter*, 149 Tenn. 569 ..... 20
*Brown* v. *Houston*, 114 U. S. 622 ..... 21
*Cargill Co.* v. *Minnesota*, 180 U. S. 452 ..... 20
*Citizens Tel. Co.* v. *Fuller*, 229 U. S. 322 ..... 23
*Clark* v. *Poor*, 274 U. S. 554 ..... 22
*Coe* v. *Errol*, 116 U. S. 517 ..... 21, 35
*Crescent Cotton Oil Co.* v. *Miss.*, 257 U. S. 129 ..... 21, 39
*Dane* v. *Jackson*, 256 U. S. 289 ..... 23
*Eastern Air Transport* v. *S. C. Tax Com.*, 285 U. S. 147 ..... 22, 42, 47, 52
*Ex Parte Bakelite Corporation*, 279 U. S. 438 ..... 14
*Fairchild* v. *Hughes*, 258 U. S. 126 ..... 14
*Foster & Creighton Co.* v. *Graham*, 154 Tenn. 412 ..... 19, 22, 25, 49
*General Oil Co.* v. *Crain*, 209 U. S. 211 ..... 36
*Green* v. *Frazier*, 253 U. S. 233 ..... 23
*Gregg Dyeing Co.* v. *Query*, —— U. S. —— ..... 22, 43, 52
*Hart Refineries* v. *Harmon*, 278 U. S. 499 ..... 21, 32
*Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 ..... 21, 40
*Helson* v. *Kentucky*, 279 U. S. 245 ..... 45
*Hinson* v. *Lott*, 8 Wall. 148 ..... 21
*Hope Gas Co.* v. *Hall*, 274 U. S. 284 ..... 22
*Interstate Transit Co.* v. *Lindsey*, 283 U. S. 183 ..... 22, 53
*Jenkins* v. *Ewin*, 55 Tenn. 473 ..... 20
*Kane* v. *New Jersey*, 242 U. S. 160 ..... 22
*Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428 ..... 14
*Kelly* v. *Pittsburgh*, 104 U. S. 78 ..... 23, 55
*Lake Superior Cons. Iron Mines* v. *Lord*, 271 U. S. 575 ..... 23, 58
*Liberty Warehouse Co.* v. *Burley Tobacco Growers Asso.*, 276 U. S. 71 ..... 10
*Liberty Warehouse Co. et al.* v. *Grannis*, 273 U. S. 70 ..... 7
*Massachusetts* v. *Mellon*, 262 U. S. 447 ..... 14

PAGE

*Michigan C. R. Co.* v. *Powers*, 201 U. S. 245 ..... 23, 55
*Miller* v. *Miller*, 149 Tenn. 463 ..... 2, 16
*Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403 ..... 20
*Muskrat* v. *United States*, 219 U. S. 346 ..... 4
*Mutual L. Ins. Co.* v. *Wisconsin*, 247 U. S. 132 ..... 23
*New Jersey* v. *Sargent*, 269 U. S. 328 ..... 14
*New Jersey Bell Tel. Co.* v. *State Board*, 280 U. S. 338 ..... 22
*Ogilvie* v. *Hailey*, 141 Tenn., 392 ..... 20, 29
*Oliver Iron Co.* v. *Lord*, 262 U. S. 172 ..... 22, 23, 42, 57
*Postum Cereal Co.* v. *Cal. Fig Nut Co.*, 272 U. S. 693 ..... 14, 17
*Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491 ..... 14
*Quick Service Tire Co.* v. *Smith*, 156 Tenn. 96 ..... 19, 25
*Quong Wing* v. *Kirkendall*, 223 U. S. 59 ..... 23, 56
*Roe* v. *Kansas ex rel.*, 27 U. S. 189 ..... 20
*St. Louis S. W. R. Co* v. *Arkansas*, 235 U. S. 350 ..... 23, 57
*Shaffer* v. *Carter*, 252 U. S. 37 ..... 23
*Shelton* v. *Platt*, 139 U. S. 591 ..... 3
*Shelton* v. *Silverfield*, 104 Tenn. 71 ..... 20
*Sonneborn Bros.* v. *Keeling*, 262 U. S. 506 ..... 21, 32
*Southwestern Oil Co.* v. *Texas*, 217 U. S. 114 ..... 56
*Sprout* v. *South Bend*, 277 U. S. 169 ..... 22, 53
*Susquehanna Coal Co.* v. *Mayor, etc., of South Amboy*, 228 U. S. 669 ..... 38
*Texas* v. *Interstate Commerce Com.*, 238 U. S. 158 ..... 14
*Texas Co.* v. *Brown*, 258 U. S. 466 ..... 21
*Trentham* v. *Moore*, 110 Tenn. 352 ..... 20
*Tullis* v. *Lake Erie & W. R. Co.*, 175 U. S. 348 ..... 20
*United States* v. *Hamburg Amerikanische Co.*, 239 U. S. 466 14
*Wick* v. *Chelan Electric Co.*, 280 U. S. 108 ..... 20
*Willing* v. *Chicago Auditorium Asso.*, 277 U. S. 274 ..... 11
*Wilson* v. *State*, 143 Tenn. 72 ..... 20
*Woodruff* v. *Parham*, 8 Wall. 123 ..... 21, 32

## TABLE OF STATUTES CITED.


| | PAGE |
|---|---|
| Tennessee Public Acts, 1923, chapter 29 | 2 |
| Tennessee Public Acts, 1923, chapter 58 | 24, 49 |
| Tennessee Public Acts, 1925, chapter 67 | 24 |
| Tennessee Public Acts, 1927, chapter 54 | 22, 49 |
| Tennessee Public Acts, 1931, chapter 45 | 22, 50 |
| Tennessee Public Acts, 1931, 2nd Extra Session, chapter 11 | 22, 50 |
| Tennessee Code of 1932, section 1790 et seq. | 3 |
| Constitution of U. S., Art. 3, sec. 2 | 4, 13 |
| Constitution of U. S., Fourteenth Amendment | 23, 54 |

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

---

No. 176

---

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
APPELLANT,

*Versus*

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL.,
APPELLEES.

---

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

---

BRIEF ON BEHALF OF ROY C. WALLACE, ET AL., DEFENDANTS

---

MAY IT PLEASE THE COURT:

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

By a journal entry of October 10, 1932, this Court entered an order in the present cause, which was in the following language:

> "Further consideration of the jurisdiction of this Court is postponed to the hearing upon the merits. The attention of counsel is invited to the question whether a case or controversy is presented, in view of the nature of the proceedings in the state courts."

In the discussion of this question the exact nature of the proceedings in the State courts becomes important.

The original bill was a proceeding under the Declaratory Judgments Act of Tennessee, Chapter 29 of the Public Acts of 1923. Complainants, in their bill, sought a construction of the various gasoline taxing statutes of the State of Tennessee and a declaration as to the constitutional validity of said statutes if they were construed as applicable to complainant.

*No relief was sought by the bill, or could be had under the pleadings in the case, other than a declaratory judgment or decree construing the statutes in question.*

The Declaratory Judgments Law of Tennessee has been held constitutional by the Supreme Court of that State.

*Miller et al.* v. *Miller*, 149 Tenn., 463.

As construed by the Supreme Court of Tennessee, the only controversy necessary to invoke action of the Court under the Declaratory Judgments

Law is that the question must be real and not theoretical, that the person raising it must have a real interest, and that there must be some one having real interest who may oppose the declaration sought.

Complainant alleges in its bill that the respondents, officials of the State of Tennessee, have called upon the complainant to pay to the State of Tennessee, privilege taxes alleged to be due. This allegation was necessary before the courts of Tennessee would entertain jurisdiction of the suit under the Declaratory Judgments Law in order that it might be shown that the complainant had a real interest in the questions raised.

The proceeding did not seek injunctive or other equitable relief from the claim of the State officials that certain privilege taxes were due. Indeed, a suit to enjoin the collection of state revenue would not have been maintainable in view of a Tennessee statute of 1873 (Section 1790, et seq., Tennessee Code of 1932), which provides that the sole and exclusive remedy of a taxpayer shall be payment of the allegedly unjust or illegal taxes under protest and suit for their recovery. This statutory remedy has been pronounced by this Court as "simple and effective" in the case of *Shelton* v. *Platt*, 139 U. S., 591.

A demurrer was filed to the bill and the demurrer was sustained, the chancellor being of the opin-

ion that the taxing statutes in question were applicable to the complainant and that such applicability did not render the statutes unconstitutional.

The opinion of the Supreme Court of Tennessee affirmed the decree of the chancellor, the said Court holding that the taxing statutes involved applied to those situated as complainant.

The proceeding was brought under a declaratory judgments act and the only relief sought or authorized was a declaratory judgment or decree construing the taxing statutes involved and determining the constitutional validity of the statutes so construed. The effect of the judgment or decree in the present proceeding is not to determine the liability of this complainant or any other person for any particular sum of money as taxes.

The jurisdictional question presented in this cause may be stated as follows: Does the Supreme Court of the United States have constitutional power to review a declaratory judgment of a state court when such judgment involves a Federal question.

In *Muskrat* v. *United States*, 219 U. S., 346, 55 L. ed., 246, this Court held that since the jurisdiction of the Supreme Court is conferred and is limited by Article 3, Section 2, of the Constitution, Congress was without power to confer upon this Court jurisdiction to determine the constitutional

validity of legislation without a "case" or "controversy" within the meaning of the Constitution. The opinion contains a full discussion of what constitutes a case or controversy within the meaning of the Federal Constitution. In this opinion the following was said:

> "It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.
>
> "It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. 'Judicial power,' says Mr. Justice Miller, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller, Const. 314.
>
> "As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.
>
> "What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies.' A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of Marbury v. Madison 1 Cranch, 137, 2 L. ed. 60, to be a suit instituted according to the regular

course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy?' That question was dealt with by Mr. Justice Field, at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:

" 'The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. Chisholm v. Georgia, 2 Dall. 431, 432, 1 L. ed. 445, 446, 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."

. . . . . .

"It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have

> seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States the judicial power extends."

*Muskrat v. United States*, 250, 251-252.

In *Liberty Warehouse Co. et al.* v. *Grannis*, 273 U. S., 70, 71 L. ed., 541, this Court held that the Federal courts have no jurisdiction of a proceeding under a declaratory judgment act of a state to determine the rights of petitioner under a statute of the state prior to the institution of an adverse proceeding under the statute. In this case a bill was filed in a Federal District Court of Kentucky, seeking a judgment under a declaratory judgment law of Kentucky. The District Court dismissed the petition upon demurrer on the

ground that it had no jurisdiction of the cause of action set forth. The judgment dismissing the petition for want of jurisdiction was affirmed. In the opinion of this Court, it is said:

> "The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope. While the Commonwealth Attorney is made a defendant as a representative of the Commonwealth, there is no semblance of any adverse litigation with him individually; there being neither any allegation that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights, nor any allegation that the Commonwealth Attorney has threatened to take or contemplates taking any action against them for any violation of the Act, either past or prospective. And no relief of any kind is prayed against him, by restraining action on his part or otherwise.
>
> "The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court.
>
> "We need not review these at length. It suffices to say that in the light of the decisions in Muskrat v. United States, 219 U. S. 346, 357, 55 L. ed. 246, 250, 31 Sup. Ct. Rep. 250; Fairchild v. Hughes, 258 U. S. 126, 129, 66 L.

ed. 499, 504, 42 Sup. Ct. Rep. 274; Texas v. Interstate Commerce Commission, 258 U. S. 158, 162, 66 L. ed. 531, 537, 42 Sup. Ct. Rep. 261; Keller v. Potomac Electric Co. 261 U. S. 428, 444, 67 L. ed. 731, 736, 43 Sup. Ct. Rep. 445; Massachusetts v. Mellon, 262 U. S. 447, 488, 67 L. ed. 1078, 1085, 43 Sup. Ct. Rep. 597; New Jersey v. Sargent, 269 U. S. 328, 330, 70 L. ed. 289, 46 Sup. Ct. Rep. 122; and Postum Cereal Co. v. California Fig Nut Co. 272 U. S. 693, ante, 478, 47 Sup. Ct. Rep. 284, in which the principles stated in earlier cases are considered and applied—it is not open to question that the judicial power vested by article 3 of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case."

. . . . . .

"It follows necessarily from these decisions that the District Court, as a court of the United States established under article 3 of the Constitution, had no jurisdiction to enter-

tain the petition for the declaratory judgment."

*Liberty Warehouse Co.* v. *Grannis*, 71 L. ed., 544, 545.

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S., 71, 72 L. ed. 473, the rule was again announced that this Court has no jurisdiction to review a mere declaratory judgment of a state court. This case was an appeal from a proceeding begun in a state court. In the proceeding the defendant filed an answer based upon the Declaratory Judgment Law of Kentucky in which the Court was asked to determine the validity of the Co-operative Marketing Act of Kentucky and to declare the rights and duties of the parties. The trial court struck this portion of the answer from the record, which action was held by this Court to have been no abuse of power. The opinion contains the following:

> "Apparently the Declaratory Judgment Statute authorizes plaintiffs only to ask for judgments. It also provides: 'The court may refuse to exercise the power to declare rights, duties or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances.' This court has no jurisdiction to review a mere declaratory judgment. Liberty Warehouse

Co. v. Grannis, 273 U. S. 70, 71 L. ed. 541, 47 Sup. Ct. Rep. 282."

*Liberty Warehouse Co.* v. *Burley T. G. Co-op. M. Asso.*, 72 L. ed., 479.

In *Willing* v. *Chicago Auditorium Association*, 277 U. S. 274, 72 L. ed., 880, this Court held again that the Federal Judiciary is without power to render a declaratory judgment. In this case a bill was filed in a Federal district court of Illinois, which sought a determination of the respective rights of a landlord and tenant under the terms of a lease. The bill was held not to state a case of which the Federal courts have jurisdiction. In the opinion it was said:

"What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the Federal judiciary. Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 74, 71 L. ed. 541, 544, 47 Sup. Ct. Rep. 282. Compare Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Asso. 276 U. S. 71, ante, 473, 48 Sup. Ct. Rep. 291. The statement, made at the bar, that Blair v. Chicago, 201 U. S. 400, 450, 50 L. ed. 801, 822, 26 Sup. Ct. Rep. 427, supports the jurisdiction, is unfounded.

"It is true that this is not a moot case, like Singer Mfg. Co. v. Wright, 141 U. S. 696, 35 L. ed. 906, 12 Sup. Ct. Rep. 103, and United States v. Alaska S. S. Co. 253 U. S. 113, 64 L. ed. 808, 40 Sup. Ct. Rep. 448; that, unlike Keller v. Potomac Electric Power Co. 261 U. S. 428, 444, 67 L. ed. 731, 736, 43 Sup. Ct. Rep. 445, and Postum Cereal Co. v. California

Fig Nut Co. 272 U. S. 693, 71 L. ed. 478, 47 Sup. Ct. Rep. 284, the matter which it is here sought to have determined is not an administrative question; that the bill presents a case, which if it were the subject of judicial cognizance, would in form come under a familiar head of equity jurisdiction; that, unlike Gordon v. United States, 117 U. S. 697, a final judgment might be given; that, unlike South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co. 145 U. S. 300, 36 L. ed. 712, 12 Sup. Ct. Rep. 921, the parties are adverse in interest; that, unlike Fairchild v. Hughes, 258 U. S. 126, 66 L. ed. 499, 42 Sup. Ct. Rep. 274, and Massachusetts v. Mellon, 262 U. S. 447, 67 L. ed. 1078, 43 Sup. Ct. Rep. 597, there is here no lack of a substantial interest of the plaintiff in the question which it seeks to have adjudicated; that, unlike New Jersey v. Sargent, 269 U. S., 328, 70 L. ed. 289 U. S. 328, 70 L. ed. 289, 46 Sup. Ct. Rep. 122 the alleged interest of the plaintiff is here definite and specific; and that there is here no attempt to secure an abstract determination by the court of the validity of a statute, as there was in Muskrat v. United States, 219 U. S. 346, 361, 55 L. ed. 246, 251, 31 Sup. Ct. Rep. 250, and Texas v. Interstate Commerce Commission, 258 U. S. 158, 162, 66 L. ed. 531, 537, 42 Sup. Ct. Rep. 261. But still the proceeding is not a case or controversy within the meaning of article 3 of the Constitution."

*Willing* v. *Chicago Auditorium Asso.*, 72 L. ed., 884-885.

While the jurisdiction of this Court was not invoked upon the ground that a declaratory judg-

ments law of a state authorized the judgment or decree appealed from, the decision is authority for the proposition that a declaratory judgment of a state court is not a case or controversy within the meaning of the Federal Constitution. That this inference is justified by the case is made quite apparent by the concurring opinion which is as follows:

> "Concurring opinion of Mr. Justice Stone:
> "I concur in the result. It suffices to say that the suit is plainly not one within the equity jurisdiction conferred by Sections 24, 28, of the Judicial Code. But it is unnecessary, and I am therefore not prepared to go further and say anything in support of the view that Congress may not constitutionally confer on the Federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this court is without constitutional power to review such judgments of state courts when they involve a Federal question. . . ."
>
> *Willing* v. *Chicago Auditorium Asso.*, supra, p. 885.

In *Arizona* v. *California*, 283 U. S., 423, 75 L. ed., 1154, the proposition was again announced that this Court cannot issue declaratory decrees.

Numerous decisions of this Court determine what are "cases" and "controversies" within the meaning of Article 3, Section 2 of the Constitution.

Cases which support the insistence that this Court is without power to review a declaratory judgment of a state court are the following:

*United States* v. *Hamburg Amerikanische Co.*, 239 U. S. 466, 60 L. ed. 387.
*Fairchild* v. *Hughes*, 258 U. S. 126, 66 L. ed. 499.
*Texas* v. *Interstate Commerce Com.*, 238 U. S. 158, 66 L. ed. 531.
*Keller* v. *Potomac Electric Power* Co., 261 U. S. 428, 67 L. ed. 731.
*Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 67 L. ed. 763.
*Massachusetts* v. *Mellon*, 262 U. S. 447, 67 L. ed., 1078.
*New Jersey* v. *Sargent*, 269 U. S. 328, 70 L. ed. 289.
*Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 71 L. ed. 478.
*Exparte Bakelite Corporation*, 279 U. S. 438, 73 L. ed. 789.

## SUMMARY OF ARGUMENT CONCERNING JURISDICTION OF SUPREME COURT OF UNITED STATES

This is a proceeding under a declaratory judgment law. The original bill expressly provided that it was filed as such suit (R., p. 13), and sought no relief other than the construction of the statutes in question (R., p. 22). In this connection it should be noted that the portion of the prayer for relief which sought a decree that the complainant did not owe any sum as a privilege tax under said statutes was stricken out of the bill by amendment (R., p. 28). The opinion of the Supreme Court of Tennessee recognized and treated the suit merely as one in which a declaratory judgment was sought and obtained. The only relief sought from the Supreme Court of the United States in this proceeding is a reversal of a declaratory judgment rendered by the state courts. The effect of a consideration by this Court of the present case upon its merits will be the rendition by it of a declaratory judgment.

This Court has declared that the Federal judiciary has no power to render a declaratory judgment. It has denied that the Federal district courts have the power to proceed under a state declaratory judgments statute. It has said that the fact that a case is not a moot one, the fact that a final judgment might be given, the fact that

there are adverse parties in interest, and the fact that the plaintiff in error has a real and substantial interest in the question, do not constitute a case or controversy within the meaning of Article 3 of the Constitution. All of these elements the Supreme Court of Tennessee has said are required before a suit brought under the State Declaratory Judgment Law will be entertained, but the presence of these elements does not prevent the suit from being simply a declaratory proceeding. Indeed, the Supreme Court of Tennessee, in sustaining the validity of the Declaratory Judgment Law of Tennessee, recognized that its State Constitution did not impose the same limitations upon the jurisdiction of its courts as was imposed by the Federal Constitution upon the Federal judiciary.

> "In *Muskrat* v. *United States*, supra, and the other decisions of the Supreme Court of the United States relied on by the majority in the Anway case to support its holding that the act there involved was unconstitutional, no actual controversy existed between the opposing parties. An examination of the federal Constitution (article 3, section 2) discloses that the judicial power of the court is limited to cases and controversies. Therefore we do not think that the case of *Muskrat* v. *United States*, and the other federal decisions cited in the majority opinion in the Anway Case, are controlling in the instant cause."

*Miller* v. *Miller*, 149 Tenn., 484.

It is true that the declaratory judgment of the State courts in this proceeding involved a Federal question. However, this is merely another manner of saying that the proceeding presents a case of which this Court would take jurisdiction "if it were the subject of judicial cognizance" by the Federal courts. As this Court said in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S., 673, 71 L. ed., 478, even if the effect of this conclusion were to leave the plaintiff in error without any other remedy "as to which we express no opinion, it cannot furnish a reason for exceeding the constitutional powers of this Court."

For the foregoing reasons, it is respectfully insisted that the present proceeding is not a case or controversy within the meaning of Article 3 of the Constitution and that this Court is without jurisdiction.

## BRIEF UPON VALIDITY OF STATE GASOLINE TAXING STATUTES

No statement of the case will be made. An outline of the pleadings and of the facts is contained in complainant's brief, which is full and accurate, and which renders unnecessary a further statement of the facts.

It is submitted that the Federal questions which arise in this cause are the following:

1. Is a privilege tax upon the storage of gasoline invalid as contravening the commerce clause of the Constitution when applied to an interstate railroad carrier which purchases gasoline in another state, ships it into the state of the tax and stores it in such state, intending to withdraw it from storage for use in essential railroad operations?

2. Does the fact that the tax burden levied by a series of statutes upon common carriers by railroad is "economically disproportionate" to the tax burden levied upon common carriers by motor vehicle render invalid as a violation of the 14th Amendment any or all of the statutes taxing common carriers by railroad?

Various incidental questions arise in the consideration of the two questions above stated. If the State cannot validly tax the storage and with-

drawal of gasoline which is intended to be transported elsewhere and used, can it validly tax the storage and withdrawal of gasoline which is to be consumed within the State, when such consumption is to be a part of interstate commerce?

Other questions are stated in the brief of appellant as arising on this record and these will be hereafter considered in the argument.

The following propositions of law are urged by appellees as supporting the decision of the State courts that the statutes involved in this proceeding are valid and enforceable and are applicable to the complainant railway in its storage of gasoline.

## I.

The statutes in question, as construed by the highest Court of Tennessee, impose a privilege tax upon all persons who store gasoline in Tennessee, thereafter withdrawing same from storage whether for sale or other use.

*Foster & Creighton Co.* v. *Graham*, 154 Tenn., 412, 420.
*Quick Service Tire Co.* v. *Smith*, 156 Tenn., 96, 102.

## II.

The construction of a state statute by the highest

Court of the State is binding upon the Supreme Court of the United States.

*Tullis* v. *Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. ed. 192.
*W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L. ed. 619.
*Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 41 L. ed. 489.
*Roe* v. *Kansas ex rel*, 278 U. S. 189, 73 L. ed. 260.
*Wick* v. *Chelan Electric Co.*, 280 U. S. 108, 74 L. ed. 216.

III.

Under the Constitution of Tennessee the Legislature has unlimited and unrestricted power to tax privileges, which power may be exercised in any mode or manner at its discretion.

*Wilson* v. *State*, 143 Tenn., 72
*Jenkins* v. *Ewin*, 55 Tenn., 473.
*Shelton* v. *Silverfield*, 104 Tenn., 71.
*Trentham* v. *Moore*, 110 Tenn., 352.
*Bank* v. *Senter*, 149 Tenn., 569.
*Ogilvie* v. *Hailey*, 141 Tenn., 392.

IV.

A state has the power, unfettered by the commerce clause, to impose a privilege tax upon the sale or the storage of gasoline which has reached its destination, has ceased to move in interstate

commerce and has been transferred from the tank cars in which transported into a storage warehouse. Of course, the tax imposed is valid only if it does not discriminate against the gasoline as an article coming from interstate commerce.

*Woodruff* v. *Parham*, 8 Wall. 123, 19 L. ed. 382.
*Hinson* v. *Lott*, 8 Wall. 148, 19 L. ed. 387.
*Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257.
*American Steel & Wire Co.* v. *Speed*, 192 U. S. 522, 48 L. ed. 547.
*Sonneborn Bros.* v. *Keeling*, 262 U. S. 506, 67 L. ed. 1097.
*Hart Refineries* v. *Harmon*, 278 U. S. 499, 73 L. ed. 475.

V.

The fact that at the time of the storage of the gasoline and at the time of its withdrawal from storage, the owner intends that the gasoline, or a portion of it, shall be used in carrying on interstate commerce, does not affect the right of the State to tax the storage and withdrawal.

*Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715.
*Heisler* v. *Thomas Collieries Co.*, 260 U. S. 245, 259, 67 L. ed. 237.
*Crescent Cotton Oil Co.* v. *Miss.*, 257 U. S. 129, 66 L. ed. 166.
*Texas Co.* v. *Brown*, 258 U. S. 466, 66 L. ed. 721.

*Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 67 L. ed. 929.
*Hope Gas Co.* v. *Hall*, 274 U. S. 284, 71 L. ed. 1049.
*N. J. Bell Telephone Co.* v. *State Board*, 280 U. S. 338, 74 L. ed. 1004.
*Eastern Air Transport* v. *S. C. Tax Com.*, 285 U. S. 147, 76 L. ed. 470.
*Gregg Dyeing Co.* v. *Query*, — U. S. —, 76 L. ed. 852.

VI.

The statutes in question impose a privilege tax upon the sale or storage of gasoline in Tennessee and not a charge for the use of the State highways.

Chapter 54, Public Acts of Tenn., 1927.
Chapter 45, Public Acts of Tenn., 1931.
Chapter 11, Public Acts of Tenn., 2nd Extra Session, 1931.
*Kane* v. *N. J.*, 242 U. S. 160, 61 L. ed. 222.
*Clark* v. *Poor*, 274 U. S. 554, 71 L. ed. 1199.
*Sprout* v. *South Bend*, 277 U. S. 169, 72 L. ed. 836.
*Interstate Transit Co.* v. *Lindsey*, 283 U. S. 183, 75 L. ed. 952.
*Foster & Creighton Co.* v. *Graham*, 154 Tenn., 412.

VII.

Common carriers by railroad and common carriers by motor vehicle constitute different class-

es of taxpayers which the State is not required to tax in the same manner or equally. The fact that the tax burden imposed upon carriers by railroad may be greater than that imposed upon carriers by motor vehicle under the taxing statutes of Tennessee, does not constitute a violation of the due process clause, or of the equality clause of the 14th Amendment.

*Dane* v. *Jackson*, 256 U. S. 289, 65 L. ed. 1107.
*Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658.
*Green* v. *Frazier*, 253 U. S. 233, 64 L. ed. 878.
*Shaffer* v. *Carter*, 252 U. S. 37, 64 L. ed. 445.
*Mutual L. Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 62 L. ed. 1025.
*Mich. Centr. R. Co.* v. *Powers*, 201 U. S. 245, 50 L. ed. 744.
*Citizens Tel. Co.* v. *Fuller*, 229 U. S. 322, 57 L. ed. 1206.
*Quong Wing* v. *Kirkendall*, 223 U. S. 59, 56 L. ed. 350.
*St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 59 L. ed. 265.
*Atchison T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909.
*Lake Superior Con. Iron Lines* v. *Lord*, 271 U. S. 575, 70 L. ed. 1093.
*Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 67 L. ed. 929

## ARGUMENT

### I.

### THE STATUTES IN QUESTION IMPOSE A PRIVILEGE TAX UPON THE STORAGE OF GASOLINE AND NOT MERELY UPON THOSE ENGAGED IN THE GASOLINE BUSINESS

Chapter 58 of the Public Acts of Tennessee for 1923, as amended by Chapter 67 of the Acts of 1925, imposes a privilege tax upon all persons who sell, distribute or store gasoline in Tennessee. The question asked on page 2 of appellant's brief as to the power of the State to tax an interstate common carrier for the privilege of doing a business which it does not do and which it cannot legally do is based upon a construction of these statutes contrary to the precise language of the statute and contrary to the construction placed upon them by the Supreme Court of Tennessee. Chapter 67, Acts of 1925, amends the original gasoline taxing statute (Chapter 58, Acts of 1923) by adding to it the following:

> "The tax imposed by this Act shall apply to persons, firms, or corporations, dealers or distributors, storing any of the products mentioned in this Act, and distributing the same, or allowing the same to be withdrawn from storage, whether such withdrawal be for sale

> or other use; provided that 'sellers' of gasoline and such substitutes thereof and distillates paying the tax herein provided may continue to pay the same computed and paid on the basis of their sales as hereinbefore required and stores and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

In *Foster & Creighton Company* v. *Graham*, 154 Tenn., 412, at page 420, the Supreme Court of Tennessee construed this tax in the following language:

> "We think the act, when properly interpreted, not only applies to distributors and dealers in gasoline, but applies to consumers who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, whether such withdrawal be for sale or other use. It therefore necessarily follows that complainant, and all other persons, etc., in like situations, come within the provisions of said act."
>
> *Foster & Creighton Co.* v. *Graham*, 154 Tenn., 420.

In *Quick Service Tire Company* v. *Smith*, 156 Tenn., 96, at page 102, the Supreme Court of Tennessee again interpreted the provision above quoted in the following language:

> "By Chapter 67, Acts of 1925, the tax of three cents a gallon was made to apply not only to gasoline sold and distributed to con-

> sumers, but also 'to persons, firms or corporations, dealers or distributors, storing . . . . and distributing the same,' and under this Act it was held in *Foster & Creighton Co.* v. *Graham, supra,* that one storing gasoline for personal use could not avoid payment of the tax of three cents a gallon on gasoline."
>
> *Quick Service Tire Co.* v. *Smith,* 156 Tenn., 102.

In view of this interpretation of the statute, it is clear that the tax is not imposed merely upon those engaged in the gasoline business, and the plaintiff Railroad is not taxed for engaging in the gasoline business. The privilege tax is imposed by the statute upon the storage of gasoline.

Of course, neither the name by which the tax is called, nor the construction given it by the State courts will prevent this Court from declaring it invalid if it is a direct burden or tax upon interstate commerce. The present tax, however, is a privilege tax applicable alike to all persons, firms, and corporations storing gasoline. The storage of gasoline cannot be interstate commerce. It is essentially a local transaction or occurrence. The storage of gasoline in a general warehouse constructed for that purpose of itself implies that something is done locally and not as an integral part of interstate commerce. The storage by the railroad of gasoline is not an integral part of interstate commerce, but is incidental to its operations as a railroad. The present tax is not an effort to burden

commerce, it is not an attempt to break up essential operations of the business of carrying by railroad, but it is a tax upon a domestic operation, which tax applies to the railroad only when it does what other persons do and for which it is taxed only as all other storers are taxed.

## II.

## THE CONSTRUCTION OF A STATE STATUTE BY THE HIGHEST COURT OF THE STATE IS BINDING UPON THIS COURT

The Supreme Court of Tennessee has construed these statutes as being a tax upon the storage of gasoline measured by withdrawals. The appellant seeks to construe these statutes as providing a tax upon the privilege of engaging in the gasoline business and asserts that the N. C. & St. L. Railway has no charter power to engage in such business. The question of the construction of the statutes is not now an open one. The appellant cannot be heard to insist that these statutes say one thing and mean another, when they have been construed by the highest court of the State as meaning what they say. The question of the interpretation of these statutes has been definitely foreclosed and is not open in this forum. The proposition is elementary that the construction placed upon a state statute by the highest court of the state is binding upon this Court. Cases supporting this fundamental and undisputed rule will not be reviewed here, as such a discussion is unnecessary.

## III.

## THE POWER OF THE LEGISLATURE OF TENNESSEE TO TAX PRIVILEGES IS UNLIMITED UNDER ITS STATE CONSTITUTION

The statutes of Tennessee have declared the storage of gasoline to be a privilege and have levied a privilege tax upon such storage. Counsel for appellant cite authority to the effect that in Tennessee the mere ownership of property cannot be made a taxable privilege and that to constitute the basis of a privilege tax one must "make a business" of doing that which is taxed. The modern decisions of the Supreme Court of Tennessee place no such limitation upon privilege taxation in the State. The Legislature of Tennessee has unrestricted power to tax privileges. The broad extent of this taxing power may be illustrated by *Ogilvie* v. *Hailey*, 141 Tenn., 392, in which the Supreme Court of Tennessee sustained an act levying a privilege tax on automobiles used for pleasure. In the opinion it is said:

> "It is next insisted that the use of automobiles for pleasure cannot be declared a privilege, inasmuch as such use is not the pursuit of any business or occupation, and it is sought to limit a privilege to such pursuits.
>
> "While some of our older cases apparently

justify these arguments, later decisions of this court declare that the doing of a single act may be declared a privilege."

*Ogilvie* v. *Hailey*, 141 Tenn., 397.

## IV.

## THE STATE HAS POWER TO TAX THE STORAGE OF GASOLINE WHICH HAS MOVED IN INTERSTATE COMMERCE AFTER IT HAS REACHED ITS DESTINATION

The privilege tax which the State in this case asserts is collectible is one upon gasoline brought into Tennessee from another state and stored by the plaintiff in its warehouse. The storage of this gasoline is not exempt from taxation because the gasoline originated in another state. Transportation of the gasoline has ceased before the act upon which the State seeks to fix the tax accrues. The gasoline has been removed from the tank cars in which it was transported and has been placed in storage. After the commerce has ceased and the gasoline has been placed in storage, it becomes property commingled with the general property of the State and amenable to its laws. The railroad, when it removes the gasoline from the tank cars in which it was transported and places it in storage in the State of Tennessee, so acts upon the gasoline that it becomes incorporated with the mass of property in the State. The storage of gasoline brought from another state cannot be exempt from taxation as interstate commerce because of the source of the goods. Of course, the tax which the State levies upon the storage of this

gasoline brought in from another state cannot be discriminatory and in fact such tax is not discriminatory because it is levied upon the storage of all gasoline, regardless of the place of its origin.

In *Woodruff* v. *Parham*, 8 Wall., 123, 19 L. ed., 382, this Court held that a privilege tax levied upon sales at auction was applicable to auction sales of merchandise from other states in original packages. It was said that the interstate transaction had ended at the time the tax liability sought to attach.

In *American Steel & Wire Company* v. *Speed*, 192 U. S., 500, 48 L. ed., 538, a merchant's tax upon goods brought into Tennessee from another state, stored in a warehouse in Tennessee and held for sale, was sustained, this Court saying that goods which were held in the warehouse were no longer in transit and had reached their destination, were not a part of interstate commerce and were taxable.

In *Sonneborn Bros.* v. *Keeling* 262 U. S. 506, 67 L. ed. 1097, this Court sustained an occupation tax upon a dealer in oil which had been transported into the state and held for sale. In this case it was held that the oil had reached its destination and was subject to the general taxing statutes of the state.

In *Hart Refineries* v. *Harmon*, 278 U. S. 499, 73 L. ed. 475, this Court said:

"This holding, as it was applied to the contention in the present case, seems to have been the result of a too literal reading of Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling) 262 U. S. 506, 67 L. ed. 1097, 43 Sup. Ct. Rep. 643, which was cited as authority. In that case, this court, upon a full review of the earlier cases, held that when a commodity shipped from another state had come to rest as a part of the stock in trade of the dealer, the interstate transportation was at an end, and whether in the original packages or not, a state tax upon the commodity, either as property or upon its sale in the state, if laid on the commodity generally without regard to its origin, would not constitute a burden upon or be a regulation of interstate commerce of which the commodity had been the subject. But there is nothing in the opinion to suggest that the taxing power of the state is limited to the two kinds of taxes mentioned. Interstate transportation having ended, the taxing power of the state in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the Federal Constitution is concerned, be exerted in any way which the state's Constitution and laws permit, provided, of course, it does not discriminate against the commodity because of its origin in another state. That under such circumstances a tax may be imposed upon the use as well as upon the sale of the commodity in domestic trade, without coming into conflict with the commerce clause, was specifically determined in Bowman v. Continental Oil Co. 256 U. S. 642, 648, 65 L. ed. 1139, 1145, 41 Sup. Ct. Rep. 606."

*Hart Refineries* v. *Harmon*, 73 L. ed., 476.

The gasoline purchased by the plaintiff railroad in another state, brought into Tennessee and stored in this State, can derive no exemption from taxation because of its source and a privilege tax of the State upon the storage of gasoline is applicable to such gasoline as may have been imported and transferred into plaintiff's warehouse, as well as to gasoline purchased in the State.

## V.

## THE STATE HAS THE POWER TO TAX THE STORAGE OF GASOLINE, NOTWITHSTANDING THAT IT IS INTENDED SUBSEQUENTLY TO USE SUCH GASOLINE IN INTERSTATE COMMERCE

The question arises in this proceeding whether the fact that at the time of the storage of gasoline the storer intends that it shall be used in carrying on interstate commerce and stores it for that purpose affects the right of the State to tax the storage. The answer to this question is that the criterion by which the right of the State is to be judged is not the intention of the one storing the gasoline, but is the status of the property at the time of the transaction.

The leading case dealing with the right of the State to tax property intended for interstate commerce is *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715. In that case it was held that goods intended for transportation to another state are liable to taxation as a part of the general mass of property of the state in which they are situate until actually started in transportation to the state of their destination. In this case Mr. Justice Bradley thus stated the rule:

> "What we have already said, however, in relation to the products of a State intended

for exportation to another State will indicate the view which seems to us the sound one on that subject, namely: that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many states there would be nothing but the lands and real estate to bear the taxes. . . ."

*Coe* v. *Errol*, 29 L. ed., 719.

*General Oil Co.* v. *Crain*, 209 U. S. 211, 52 L. ed., 754, is a case which clearly illustrates the power of the State to tax property notwithstanding that such property is destined for sale or use in another state. In this case oil was shipped to Memphis, Tennessee, from refining points in Ohio and Pennsylvania. The oil was shipped in tank cars and was to be forwarded to customers in Arkansas, Louisiana and Mississippi. At Memphis the Oil Company maintained two storage tanks, one of which was plainly marked "Oil already sold in Arkansas, Louisiana and Mississippi." This oil remained in Memphis only long enough (a few days) to be properly distributed according to the orders therefor. The other tank was for oil sold

in those states and kept separate and apart until orders should be received from customers in those states. A statute of Tennessee subjected the oil to an inspection tax and the question was as to the validity of such tax. The court considered the case as involving the power of taxation and not as involving merely an inspection fee and sustained the validity of the tax. In the opinion it is said:

> "The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State, Detnold, Prosecutor, v. Engle, supra, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfil orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this.
>
> . . . . . .
>
> "This certainly describes a business,—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary,—a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in American Steel & Wire Co. v.

Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365."

*General Oil Co.* v. *Crain*, 209 U. S. 211, 52 L. ed., 765-766.

The facts of the case at bar are almost identical with the facts involved in General Oil Co. v. Crain. In both cases oil destined for use or sale in another state was brought into Tennessee, transferred from the tank cars in which it had been transported and placed in storage tanks in this State. Such action by the importer necessarily terminates interstate commerce and constitutes a definite interruption of transit by which the article acquires a situs in Tennessee.

The principle of General Oil Co. v. Crain, supra, was approved in Susquehanna Coal Co. v. Mayor, etc., of South Amboy, 228 U. S. 669, 57 L. ed. 1017, in which a state tax upon coal shipped into the state and stored for further shipment to ports in other states or countries was sustained. In this case also it was said that there was something more than an incidental interruption of the continuity of the transportation through the state.

In *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed., 615, a state tax on grain stored in elevators pending inspection and shipment was sustained. In this case grain destined for transportation to Eastern cities was removed from the cars in which shipped at Chicago for inspection, weighing, etc. Such grain was held liable for local taxation under the

authority of General Oil Co. v. Crain, supra, American Steel & Wire Co. v. Speed, supra, etc. In the opinion it is said:

> "But neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state, and there to dispose of it, can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation."
>
> *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed. 620.

In *Crescent Cotton Oil Company* v. *State of Mississippi*, 257, U. S. 129, 66 L. ed. 166, it was held that the intention to export to another state when

manufactured, an article which was in process of manufacture, did not render it an article of interstate commerce. The same criterion which was applied in *Coe* v. *Errol*, to determine the right of the state to tax, was again applied in this case.

In *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 67 L. ed. 237, the validity of a state tax upon a particular kind of coal which was found exclusively in one state and the largest market for which was found in other states, was involved. The tax was imposed only upon coal "ready for shipment or market" and it was insisted that such a tax was a burden upon commerce. This Court held that the intention to ship the coal into other states did not give it immunity from state taxation and that therefore the statute was not an unconstitutional interference by the state with commerce. In the opinion it is said:

> "We are unable to discern . . . materiality or pertinency . . . in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it; and a tax upon articles in one state that are destined for use in another state cannot be called a regulation of interstate commerce, whether imposed in the certainty of a return from a monopoly existing, or in the doubt and chances because of competition. The action of the state, as a regulation of interstate commerce, does not de-

pend upon the degree of interference; it is illegal in any degree.

"We may, therefore, disregard the adventitious considerations referred to and their confusion, and, by doing so, we can estimate the contention made. It is that the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce, though they have not moved from the place of their production or preparation.

"The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production."

*Heisler* v. *Thomas Colliery Co.*, 67 L. ed., 243.

In *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 67 L. ed. 929, the State of Minnesota had imposed a tax on the business of mining iron ore measured by a percentage of the value of the ore mined or produced. Substantially all of the ore when mined was loaded on cars and shipped into other states to satisfy existing contracts. In holding that a tax on production was not a burden on interstate commerce, though the ore was destined for transportation in such commerce even before it was mined, this Court said:

> "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."
>
> *Oliver Iron Co.* v. *Lord*, 67 L. ed., p. 936.

The same holding has been made with respect to the production tax on gas in *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 71 L. ed. 1049.

In *Eastern Air Transport* v. *South Carolina Tax Com.*, 285 U. S. 147, 76 L. ed. 470, this Court upheld the validity of a privilege tax upon the sale of gasoline within a state, notwithstanding that the purchaser intended to use the gasoline in conducting interstate transportation by air transport lines. It was said that the purchase of sup-

plies for conducting an interstate business is not so identified with commerce as to make a tax upon the sale of such supplies invalid. The Court said:

> "Undoubtedly, purchases of goods within a state may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected."

*Eastern Air Tr.* v. *S. C. Tax Com.*, 472.

In *Gregg Dyeing Co.* v. *Query*, — U. S. —, 76 L. ed. 852, this Court sustained the validity of a statute taxing the storage of gasoline purchased in another state, brought into the state and stored, to be used and consumed in the state. In the opinion it is said:

"The gasoline has come to rest within the State, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the State has the authority 'to tax the products or their storage or sale.' Texas Co. v. Brown, 258 U. S. 466, 478, 66 L. ed. 721, 727, 42 S. Ct. 375; Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling) 262 U. S. 506, 519, 520, 67 L. ed. 1095, 1102, 43 S. Ct. 643; Hart Refineries v. Harmon, 278 U. S. 499, 501, 502, 73 L. ed. 475-477, 49 S. Ct. 188. Not only may local sales of gasoline thus brought into the State be taxed, but its use as well. This was specifically determined in Bowman v. Continental Oil Co. 256 U. S. 642, 648, 649, 65 L. ed. 1139, 1145, 41 S. Ct. 606. See Hart Refineries v. Harmon, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188, supra; George E. Breece Lumber Co. v. Asplund, 283 U. S. 788, 75 L. ed. 1415, 51 S. Ct. 352. There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation. Helson v. Kentucky, 279 U. S. 245, 252, 73 L. ed. 683, 687, 49 S. Ct. 279; Eastern Air Transport v. South Carolina Tax Commission, decided March 14, 1932 (— U. S. —, ante, 470, 52 S. Ct. 340). In view of these well-established principles, we find no ground for concluding that the State could not impose the tax with respect to the gasoline of appellants which was kept within the State for use in their local enterprises. As the Court said, in Hart Refineries v. Harmon, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188, supra, interstate transportation having ended, the taxing power of the State in respect of

> the commodity may, so far as the commerce clause of the Federal Constitution is concerned, 'be exerted in any way which the State's constitution and laws permit.' This, of course, is on the assumption that the tax does not discriminate against the commodity because of its origin in another State."

*Gregg Dyeing Co.* v. *Query*, 76 L. ed., 855.

The case of *Helson* v. *Kentucky*, 279 U. S. 245, 73 L. ed. 683, upon which the plaintiff in error especially relies, is not in point. In that case a statute of Kentucky taxed the use of gasoline within the state. The state officials brought action to recover the tax from the operators of a ferry-boat who purchased gasoline in Illinois and used same in operating an interstate ferry-boat. The question of the right of the state to tax the storage of gasoline intended for use in interstate commerce was not involved. The question involved was the right of the state to tax the use in interstate commerce of gasoline purchased in another state. It was held that:

> "While a state has the power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce."

In the Helson case plaintiff's office and place of business and the situs of all its property was in

another state, so that, of course, there was no property or business in Kentucky to be taxed. Since there was no property situated in Kentucky upon which a tax of any kind could be imposed, the tax was necessarily a tax upon the use of gasoline which never had a situs in the state. There is an obvious distinction between taxing gasoline used for motor fuel in interstate commerce and taxing the storage of gasoline within the state. The tax involved in the present proceeding is not upon the use of gasoline, but is a tax upon the privilege of storing and distributing it within the state. In the case at bar we have property located within the State and used in such way as to constitute a business subjecting it to a privilege tax.

A state has the same right to tax the storage of property that it has to tax the production of gas, the mining of coal or the manufacture of merchandise. If destination of the product for use or shipment in interstate commerce does not affect the power of the state to tax production, mining or manufacturing, there is no reason why the intention that property stored shall ultimately be used in carrying on interstate commerce should affect the right of the state to tax its storage.

In this connection it should be pointed out that in *Gregg Dyeing Co.* v. *Query, supra,* this Court expressly sustained the validity of a tax upon the storage of gasoline, when such gasoline had been

purchased in another state but was stored in the state of the tax to be used and consumed in that state. Of course, the tax upon the storage and consumption of gasoline in the state would apply, regardless of the purpose for which the gasoline was stored. Therefore, as to the gasoline which the plaintiff stores in Tennessee, to be used and consumed in Tennessee, there can be no question concerning its liability for taxation. Such liability has been expressly fixed by the Gregg case.

The plaintiff alleges that all of the gasoline stored by it is used in essential railroad work and that it would not be possible to allocate the consumption as between interstate and intrastate commerce. This allegation refers to an allocation of the gasoline used and not to a determination of the state in which the gasoline was consumed. The determination of what amount of this gasoline stored in Tennessee is used and consumed in Tennessee could be made and it is respectfully insisted that as to gasoline stored in Tennessee for consumption in Tennessee the question of plaintiff's liability has been foreclosed by previous decisions of this Court.

In *Eastern Air Transport* v. *South Carolina Tax Commission, supra,* this Court sustained a tax upon the sale of gasoline intended to be used in interstate commerce. In the present case, as to the gasoline stored in Tennessee and intended to be

shipped to other states for use in interstate commerce, this Court is asked to hold that a tax upon the storage of gasoline is not invalid as a violation of the commerce clause merely because of an intent subsequently to ship the gasoline elsewhere and use it in interstate commerce.

## VI.

## THE STATUTES IN QUESTION IMPOSE A PRIVILEGE TAX AND NOT A CHARGE FOR THE USE OF THE STATE HIGHWAYS

For the appellant it is insisted that the statutes in question are not a genuine tax, but in reality are a charge placed upon users of the highway as compensation for such use. The statutes in question purport to be a tax and not a charge for the use of highways. The original statute, Chapter 58 of the Acts of 1923, is "an act requiring all persons, firms, associations . . . to pay to the State Comptroller a privilege tax." The Supreme Court of Tennessee in *Foster Creighton Co.* v. *Graham*, 154 Tenn., 412, treats the statute as a taxing statute.

Further proof, if such be needed, that these statutes impose a tax and not a charge for the use of highways, is furnished by various amendatory acts. As the gasoline statutes of Tennessee have been amended, not all of the funds derived from the gasoline tax go into the general highway fund. Chapter 54 of the Public Acts of 1927, an act providing for the establishment of the Great Smoky Mountains National Park in the State of Tennessee and providing for the acquisition of land for such park, contains a provision as follows:

"Sec. 15. *Be it further enacted*, That from and after January 1, 1932, the income derived from and representing one-tenth of one per cent per gallon of the State Gasoline Tax shall be and is hereby set apart and held in the State Treasury as a sinking fund for the payment and retirement of the principal and interest of the bonds herein authorized, such fund to be designated as 'Park Bonds Retirement Fund,' and the interest earned on such fund shall be added to the fund, and such sinking fund shall be and it is hereby specially pledged for and shall be exclusively applied to the payment of the principal and interest of such bonds until all of them shall be paid and retired. . . ."

Chapter 45 of the Public Acts of 1931 provides that two cents of the gasoline tax shall constitute a separate fund to be returned by the State to the counties for the construction of county highways, which are not a part of the State system.

Chapter 11, Acts of the 2nd Extra Session of 1931, provides that a fund equivalent to that derived from a gasoline tax of one cent per gallon shall be placed to the credit of the general fund.

These statutory enactments demonstrate conclusively that the so-called gasoline tax is in fact a tax and not compensation for the use of highways, because a substantial portion of the fund derived from such tax is not used in any highway construction, and another substantial portion of

the fund is used for the construction of rural highways which are not a part of the State system. Obviously, the money which is forthcoming from these statutes could not be compensation for the use of the highway system, since the statutes were enacted and the revenue was collected at the very outset and before the State Highway System was built.

A tax does not become a charge instead of a tax because the burden imposed generally falls upon those who benefit from it. It is true that one theory of taxation would impose burdens only upon those who receive benefits, but a tax does not derive its validity from the particular benefit which the taxpayer may receive from it. The rule is elementary that a person taxed cannot object to the tax on the ground that he receives no benefit from the application of the proceeds of the tax. The rule is well stated in Cooley on Taxation, Vol. I, Section 89:

> "For instance, every citizen is bound to pay his proportion of a school tax although he has no children, or is not a resident, and this also applies to corporations; of a police or fire tax, although he has no buildings or personal property; or of a road tax although he never used the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefits. So property within the limits of a municipality is subject to local taxation although it derives little or no benefit from the

> municipal government. This rule is often applied to the taxation for special purposes of agricultural lands situated within the corporate limits of cities. If such property was exempted, the provision of the constitution requiring taxes to be equal and uniform would be violated."

Plaintiff in error seeks to draw an analogy between the lack of benefit received by the railroad and the lack of benefit which renders a special assessment invalid. The difficulty here, however, is that it is only in case of a special assessment that it is essential to show that the fund expended will benefit the particular taxpayer. If the railroad in this case could escape liability for the gasoline tax upon the theory that it receives no benefit, then the decision of this Court in *Eastern Air Transport* v. *South Carolina Taxing Commission*, *supra*, and in *Gregg Dyeing Co.* v. *Query*, supra, was incorrect. In both of those cases the taxpayer seeking to escape liability from the gasoline tax intended to consume the gasoline by a use not upon the highways. In both of those cases the amount of the gasoline tax was substantially the same as that imposed by the State of Tennessee. In both of those cases the taxpayer was required to pay, notwithstanding that he sought to make use of the gasoline without using the state highway system.

The rule that a particular taxpayer need not benefit from a tax levied for a lawful governmental purpose is too well established to need elaboration.

However, in the present case it cannot be said that the railroad does not receive a benefit from the construction of rural roads which open up new sources of freight and passenger traffic.

In *Interstate Transit Co.* v. *Lindsey*, 283 U. S. 183, *Sproutt* v. *South Bend*, 277 U. S. 169, and other similar cases, this Court held that the State, in certain situations, denied the power of taxation by the commerce clause, may collect a reasonable charge from users of its highways, but from these decisions no inference can be drawn that the State must construct its highways by a tax or charge levied against users of the system. In other words, this Court in this kind of cases has said that a so-called charge for the use of highways is invalid if it is actually a tax, but this Court has not said that a tax is invalid if it is not substantially a reasonable charge upon the particular taxpayer. The same contention which plaintiff in error makes in this regard might be made by a farmer who uses gasoline in his tractor; it might be made by a taxpayer who pays a school tax when none of his family use the schools; it might be made by one who pays an ad valorem tax, a portion of which is used for the maintenance of a park, when the individual never uses the park; but this objection has uniformly been disallowed by the courts in all cases where it has been made.

## VII.

## COMMON CARRIERS BY RAILROAD AND COMMON CARRIERS BY MOTOR VEHICLE CONSTITUTE DIFFERENT CLASSES OF OCCUPATIONS WHICH THE STATE IS NOT REQUIRED TO TAX IN THE SAME MANNER OR EQUALLY

Plaintiff in error complains that because the "economic burden" imposed upon railroads by the taxing statutes of Tennessee is greater than that imposed upon common carriers by motor vehicle, it is denied a right or privilege guaranteed to it by the 14th Amendment. No discriminatory provisions in the taxing laws of Tennessee are assailed. No particular exemptions in the law favorable to motor vehicles and unfavorable to railroads are pointed out. The principal ground for complaint is that the State has seen fit to build a highway system and to permit motor vehicles to use the highway system without adequate charge, while the railroads are required to expend large sums for the maintenance of their own rights-of-way. The conclusion is sought to be reached that the gasoline taxing statutes are therefore unconstitutional as a violation of the due process of law clause or of the equality clause of the 14th Amendment.

The decisions of this Court construing the 14th

Amendment in its relation to the taxing power of the states, justify no such conclusion.

In the case of *Kelly* v. *City of Pittsburgh*, 104 U. S. 78, 26 L. ed. 658, this Court held that the fact that a taxpayer did not receive the same benefit from a tax as other citizens, and that his taxes bore an unjust relation to the benefits received, did not constitute a violation of the 14th Amendment.

In *Atchison T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, this Court held that the 14th Amendment did not forbid classification and could not be used to prevent the inequality which sometimes results from classification.

In *Michigan C. R. Co.* v. *Powers*, 201 U. S. 245, 50 L. ed. 744, this Court held that nothing in the Federal Constitution prevents a state from singling out railroad and other corporate property and taxing it for state purposes in a manner and at a rate different from that applicable to other property. In the opinion it is said:

> "There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the 14th Amendment to the Constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an iron rule of equality, to prevent the classi-

> fication of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice."
>
> *Michigan C. R. Co.* v. *Powers*, 50 L. ed., 761.

In *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 54 L. ed. 688, this Court held that the imposition of an occupation tax on wholesale dealers in oil, without exacting a similar tax from wholesale dealers in other articles, is not invalid as violating the due process of law clause of the 14th Amendment. The opinion says:

> "Still it was never contemplated, when the amendment was adopted, to restrain or cripple the taxing power of the states, whatever the methods they devised for the purposes of taxation, unless those methods by their necessary operation were inconsistent with the fundamental principles embraced by the requirements of due process of law and the equal protection of the laws in respect of rights of property."

In *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 56 L. ed. 350, this Court sustained a tax upon laundries, from which were exempted steam laundries and women engaged in the laundry business, where not more than two women are employed. Construing the 14th Amendment it was said:

> "A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree."

In the case of *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 59 L. ed. 265, this Court held that the 14th Amendment does not impose an iron clad rule upon the states with respect to taxation and does prevent them from imposing unequal taxes, so long as the inequality is not based upon arbitrary discriminations. This rule was again announced in *Shaffer* v. *Carter*, 252 U. S. 37, 64 L. ed. 445.

In *Oliver Iron & Mining Co.* v. *Lord*, 262 U. S. 172, 67 L. ed. 930, this Court sustained a state tax classifying persons engaged in mining and exempting contractors who perform the labor of preparing the mines. The Court said:

> "The contentions made under the equal protection provision of the 14th Amendment and under the state constitutional provision that 'taxes shall be uniform upon the same class of subjects' present a question of classification and have been argued together.
>
> Consistently with both provisions the legislature of the state may exercise a wide discretion in selecting the subjects of taxation, par-

> ticularly as respects occupation taxes. It may select those who are engaged in one class of business and exclude others, if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules."
>
> *Oliver Iron & Mining Co.* v. *Lord*, 67 L. ed. 936.

In *Lake Superior Consolidated Iron Mines* v. *Lord*, 271 U. S. 577, 70 L. ed. 1093, this Court sustained a tax upon ore lands as a distinct class of property, which tax did not extend to quarries and forests. Again the principle was announced that the State legislature may exercise wide discretion in selecting the subjects of taxation.

From the cases cited and many other decisions of this Court the principle is deducible that the 14th Amendment cannot be used to correct mere inequalities of burden, nor hardships resulting from taxing statutes which are based upon reasonable classifications of taxpayers and property.

The differences between transportation by railroad and transportation by motor vehicle are so marked as to require no elaboration. The real complaint of the plaintiff railroad is that a new competitive business has come up within the past decade which the present taxing statutes of Tennessee—and of other states—do not reach with the same effect as in the case of railroads. It fur-

ther complains because all taxpayers who sell, distribute or store gasoline are required to pay taxes, the major portion of which are used for highway construction, and the effect of the construction of these highways is to injure the business of the railroad. However, even where the construction or improvement of a highway harms a railroad, the railroad company cannot escape liability from a general tax.

## CONCLUSION

It is respectfully submitted that if this Court take jurisdiction of the present proceeding, it should hold the statutes involved constitutional and should affirm the opinion of the Supreme Court of Tennessee.

Respectfully submitted,

R. H. BEELER,
*Attorney-General of the State of Tennessee.*

W. F. BARRY, JR.,
*Assistant Attorney-General.*

EDWIN F. HUNT,
*Assistant Attorney-General.*

FILE COPY

FILED
DEC 3 1932
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1932

No. 176

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
*Appellant*

*v.*

ROY C. WALLACE, Comptroller of the Treasury of the State of Tennessee, et. al.,
*Appellees*

MOTION OF EDWIN M. BORCHARD AND CHARLES E. CLARK FOR LEAVE TO FILE BRIEF AS *Amici Curiae*, and

## BRIEF ON JURISDICTION

EDWIN M. BORCHARD,
of New Haven, Conn.

CHARLES E. CLARK,
of New Haven, Conn.
*Amici Curiae.*

# Supreme Court of the United States

OCTOBER TERM, 1932

---

No. 176

---

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, *Appellant*

*v.*

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL., *Appellees*

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE.*

In the above-entitled case the undersigned move for leave to file the accompanying brief as *amici curiae.*

The undersigned do not represent private parties interested in the questions presented in this case, but are themselves interested as students and teachers of law.

Counsel for both sides have consented to the filing of this brief.

EDWIN M. BORCHARD,
of New Haven, Conn.

CHARLES E. CLARK,
of New Haven, Conn.
*As Amici Curiae.*

# TABLE OF CONTENTS.

*Brief of Edwin M. Borchard and Charles E. Clark, Amici Curiae*


PAGE

Preliminary Statement ..... 1

Question Presented ..... 4

Summary of Argument ..... 4

POINT I. Each State has general jurisdiction to regulate the procedure of its own courts ..... 6

POINT II. Thirty-two states and territories, following the procedure well established in England and in other countries, have determined that the action for a declaratory judgment, so-called, is a useful and necessary part of their court procedure and it is now in general use in these jurisdictions ..... 7

POINT III. In the present case, the highest court of the State of Tennessee, following the procedure which it, in common with other states, has established as regular and proper, has made a final adjudication with reference to a Tennessee tax statute, binding upon all parties so far as the power of the state can make it so, and adjudicating costs against the appellant ..... 15

POINT IV. A decision by this Court that the judgment of the Supreme Court of Tennessee is not subject to appeal, with the effect of rendering doubtful if not of nullifying an established procedure of a state court, is a control of state court procedure which this Court should not assume except under the compulsion of an overriding federal law ..... 17

POINT V. There is no constitutional provision or adjudication of this Court requiring a decision that the state court judgment here in question is not subject to appeal; the contrary holding is more consistent with the due regard had by this Court for the sovereign powers of the states ..... 20

PAGE

POINT VI. Irrespective of any conflict between state and federal authority in this case, the procedure of courts, which is not an end in itself but only a means to the end of accomplishing justice, should be subject to modification and improvement as the need may appear and, in the absence of express provision, it should not be held controlled by the rigid and practically unchangeable limitations of a written constitution ..... 25

POINT VII. The judgment of the Supreme Court of Tennessee in this particular action decides an actual controversy, is final, and is, therefore, subject to appeal ... 31

APPENDIX I. The Use of the Declaratory Judgment .. 33

APPENDIX II. Declaratory Judgments Approved—Selected Cases ..... 39

APPENDIX III. Bibliography ..... 43

APPENDIX IV. Recent decisions of the Supreme Court of the United States involving judgments which are in effect declaratory ..... 46

APPENDIX V. Recent decisions of the Supreme Court in which a declaration is asked for, plus an injunction or other relief, as incidental or ancillary thereto ..... 48

# TABLE OF CASES CITED.


PAGE

Abie State Bank v Weaver, 51 Sup. Ct. 252 (1931) .... 30
Additional Law Judge, 53rd Jud. Dist., 10 D. & C. 577 (Pa. 1927) .... 12
Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923) .... 30, 31
Annexation of Part of Lancaster Township to City of Lancaster, In re, 6 D. & C. 36 (Pa. 1924) .... 11
Anway v. Grand Rapids Ry., 211 Mich. 592, 179 N. W. 350 (1920) .... 8, 17
Arkansas v. Tennessee, 246 U. S. 158 .... 23
Attorney-General v. Merthyr Tydfil Union, [1900] 1 Ch. 516 .... 28
Baumann v. Baumann, 250 N. Y. 382, 165 N. E. 819 (1929) .... 28
Bell Telephone Co. v. Lansdowne Borough, 18 Dela. Cy. 307 (Pa. 1927) .... 11
Black v. Elkhorn Coal Corp., 233 Ky. 588, 26 S. W. (2d) 481 (1930) .... 8
Blakeslee v. Wilson, 190 Cal. 479, 213 Pac. 495 (1923) 8
Board of Education v. Van Zandt, 119 Misc. 124, 195 N. Y. S. 297 (1922), *aff'd*, 234 N. Y. 644, 138 N. E. 481 (1923) .... 9
Braman v. Babcock, 98 Conn. 549, 120 Atl. 150, 152 (1923) .... 8
Coke v. Shanks, 209 Ky. 723, 273 S. W. 552 (1925) .... 12
Coles, In re [1907] 1 K. B. 1, 4 .... 25
Colson v. Pelgram, 259 N. Y. 370, 182 N. E. 19 (1932) 28
Constitutionality of Section 251.18, Wisconsin Statutes, In re, 204 Wis. 501, 236 N. W. 716 (1931) .... 26
Crawford v. Favour, 34 Ariz. 13, 267 Pac. 412 (1928) 11, 12
Cryan's Estate, In re, 301 Pa. 386, 152 Atl. 675 (1930) 14
Cummings v. Shipp, 156 Tenn. 595, 3 S. W. (2d) 1062 (1928) .... 12
Deep Creek Gold Dredging Co. v. Gympic Quartz Crushing Battery Co., 8 Queensland L. J. 131 (1897) .... 28
Denver Land Co. v. Moffat Tunnel Impr. Dist., 87 Colo. 1, 284 Pac. 339 (1930) .... 12
Durham v. Rasco, 30 N. M. 16, 227 Pac. 599, 34 A. L. R. 838 (1924) .... 14
Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147 .... 3

PAGE

East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S. 465 ..... 3
Erwin Billiard Parlor v. Buckner, 156 Tenn. 278, 300 S. W. 565 (1927) ..... 13, 28
Evangelical Lutheran Church of the Ascension, of Snyder, N. Y. v. Sahlem, 254 N. Y. 161, 172 N. E. 455 (1930) ..... 28
Evans v. Manchester, Sheffield & Lincolnshire Ry., 36 Ch. D. 626 (1887) ..... 28
Faulkner v. City of Keene, 85 N. H. 147, 155 Atl. 195 (1931) ..... 8
Fidelity Nat. Bank & Trust Co. v. Swope, 274 U.S. 123 ..... 10, 24
Fox v. Title and Trust Co., 129 Ore. 530, 277 Pac. 1003 (1929) ..... 14
Fox Film Corp. v. Doyal, 286 U. S. 123 ..... 3
Freeholders of Hudson County, In re, 105 N. J. L. 57, 143 Atl. 536 (1928) ..... 12
Gaines v. Fuentes, 92 U. S. 10 ..... 24
Garden City News v. Hurst, 129 Kan. 365, 282 Pac. 720 (1929) ..... 11
Georgia v. South Carolina, 257 U. S. 516 ..... 23
Grand Rapids & Indiana Ry. v. Butler, 159 U. S. 87 (1895) ..... 6
Graniteville Mfg. Co. v. Query, 283 U. S. 376 ..... 3
Gwynne v. Bd. of Educ'n of Union Free School Dist., 259 N. Y. 191, 181 N. E. 353 (1932) ..... 28
Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U. S. 151, 158 (1931) ..... 6
Hayden Plan Co. v. Friedlander, 97 Cal. App. 12, 275 Pac. 253 (1929) ..... 12
Hess v. Country Club Park, 296 Pac. 300 (Cal. App. 1931) ..... 10, 14
Holly Sugar Corp. v. Fritzler, 42 Wyo. 446, 296 Pac. 206 (1931) ..... 9
Hylton v. United States, 3 Dall. 171, 172 (1796) ..... 30, 31
Iowa Central Ry. Co. v. Iowa, 160 U. S. 389 (1896) ..... 6
Jordan v. Massachusetts, 225 U. S. 167 (1912) ..... 6
Kariher's Petition (No. 1), 284 Pa. 455, 131 Atl. 265 (1925) ..... 9, 10
Kelly v. Jackson, 206 Ky. 815, 268 S. W. 539 (1925) ..... 14
La Abra Silver Mining Co. v. United States, 175 U. S. 423 ..... 23
Ladner v. Siegel, 294 Pa. 368, 144 Atl. 274 (1928) ..... 12
Liberty Warehouse Co. v. Burley Tobacco Growers, 276 U. S. 71 (1928) ..... 20, 22
Liberty Warehouse Co. v. Grannis, 273 U. S. 70 ..... 20, 21

PAGE

Lisbon Village Dist. v. Town of Lisbon, 85 N. H. 173, 155 Atl. 252 (1931) ..... 12
Little v. Smith, 124 Kan. 237, 257 Pac. 959 (1927) ..... 13
Lockwood v. Baird, 59 N. D. 713, 231 N. W. 851 (1930) 12
London Ass'n of Shipowners v. London & India Docks, [1892] 3 Ch. 242 ..... 28
Louisiana v. Mississippi, 202 U. S. 1 ..... 23
Lynn v. Kearney County, 121 Neb. 122, 236 N. W. 192 (1931) ..... 8
Marquat v. Marquat, 12 N. Y. 336 (1855) ..... 14
Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) ... 18, 19
Mason's Adm'r v. Mason's Guardian, 239 Ky. 208, 39 S. W. (2d) 211 (1931) ..... 12
McCrory Stores Corp., v. S. M. Braunstein, Inc., 102 N. J. L. 590, 134 Atl. 752 (1926) ..... 8
Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1924) 9, 10
Milwaukee, City of, v. Chicago & N. W. Ry., 201 Wis. 512, 230 N. W. 626 (1930) ..... 9
Morton v. Pacific Constr. Co., 36 Ariz. 97, 283 Pac. 281 (1929) ..... 8
Muskrat v. United States, 219 U. S. 346, 356 ..... 22
Noble State Bank v. Haskell, 219 U. S. 104 (1911) .... 30
O'Gorman & Young, Inc. v. Hartford Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931) ..... 30, 31
Oklahoma v. Texas, 272 U. S. 21 ..... 23
Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716 ..... 10, 22
Pacific Railway Commission, In re, 32 Fed. 241, 255 (C. C. N. D. Cal. 1887) ..... 15, 22
Pathé Exchange, Inc. v. Cobb, 202 App. Div. 450, 195 N. Y. S. 661 (1922), *aff'd*, 236 N. Y. 539, 142 N. E. 274 (1923) ..... 13
Patterson's Ex'rs v. Patterson, 144 Va. 113, 131 S. E. 217 (1926) ..... 9
Pennsylvania v. West Virginia, 262 U. S. 553, 591, 593 13
Perry v. City of Elizabethton, 160 Tenn. 102, 22 S. W. (2d) 359 (1929) ..... 11, 14
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 158 U. S. 601, 15 Sup. Ct. 912 (1895) 30, 31
Public Defense Ass'n v. Allegheny County, 6 D. & C. 182 (Pa. 1924) ..... 12
Purity Oats Co. v. State, 125 Kan. 558, 264 Pac. 740 (1928) ..... 11
Reese v. Adamson, 297 Pa. 13, 146 Atl. 262 (1929) .. 12, 14
Reggel, Ex parte, 114 U. S. 642 (1885) ..... 6

PAGE

Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, (H. L.) [1921] 2 A. C. 438, reported in 19 A. L. R. 1101 ..... 11
Sharon v. Tucker, 144 U. S. 533 ..... 24
Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930) .. 8, 10
Smith v. Adams, 130 U. S. 167 ..... 24
State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527 ..... 3
State *ex rel.* Baird v. Board of Commissioners of Wyandotte County, 117 Kan. 151, 230 Pac. 531 (1924) .... 13
State *ex rel.* Foster-Wyman Lumber Co. v. Superior Court, 148 Wash. 1, 267 Pac. 770 (1928) ..... 26
State *ex rel.* Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82 (1921) ..... 8
State Tax Commission of Mississippi v. Interstate Natural Gas Co., 284 U. S. 41 ..... 3
Terrace v. Thompson, 263 U. S. 197, at 216 ..... 13
Tripp v. Santa Rosa Street Ry., 144 U. S. 126 (1892) .. 6
United States v. Jones, 119 U. S. 477 ..... 23
Utah State Fair Ass'n v. Green, 68 Utah 251, 249 Pac. 1016 (1926) ..... 13
Wagner v. County of Somerset, 96 Pa. Super. Ct. 434 (1929) ..... 12
Washington-Detroit Theater Co. v. Moore, 249 Mich. 673, 229 N. W. 618 (1930) ..... 8
West v. Louisiana, 194 U. S. 258 (1904) ..... 6
Williams v. Flood, 124 Kan. 728, 262 Pac. 563 (1928) 11, 14
Williams v. Riley, 280 U. S. 78 ..... 24
Willing v. Chicago Auditorium Asso., 277 U. S. 274 ... 20
York v. Texas, 137 U. S. 15 (1890) ..... 6
Zoercher v. Agler, 202 Ind. 214, 172 N. E. 186 (1930) 8
49 C. J. 173 ..... 14
31 Cyc. 110 ..... 14

## Other Citations.

American Bar Association Journal (1930), Vol. 16, pp. 199-202 ..... 26
American Bar Association Journal Supp. (March, 1927), Vol. 12 ..... 26
American Digest Series, Pleading, sec. 72 ..... 14
Annals of the American Academy of Political & Social Science (1917), Vol. 73, pp. 68-77 ..... 26
Arnold, T. W., *Judicial Councils*, 35 W. Va. L. Q. 193 (1929) ..... 26
*Bibliography on Judicial Councils*, 24 Law Library Journal 25, 65 (1931) ..... 26
Cardozo, Mr. Justice, *A Ministry of Justice*, 35 Harv. L. Rev. 113 (1921), reprinted in Law and Literature (1930) ..... 26
Central Law Journal (1927), Vol. 100, p. 95 ..... 18
Clark, Code Pleading (1928), p. 32 ..... 26
Clark, Code Pleading, pp. 179, 184 ..... 14
Harvard Law Review (1926), Vol. 39, p. 725 ..... 26
Harvard Law Review (1932), Vol. 45, pp. 793, 839 ..... 13
Harvard Law Review (1932), Vol. 45, p. 1089 ..... 29, 30
Hughes, Mr. Chief Justice, 45 A. B. A. Rep. 266 (1920), 91 Cent. L. J. 435 (1920), 53 Chicago Legal News 205 (1921) ..... 22
Pound, Roscoe, 10 Ill. L. Rev. 163, 170, 177 ..... 26
Rep. on Judicial Councils, Com. on Jud. Adm. of the Merchants' Ass'n of New York (1931), pp. 95-123 ..... 26
Rosenbaum, The Rule Making Authority in the English Supreme Court (1917) ..... 25
Sunderland, E. R., *The Machinery of Procedural Reform*, 22 Mich. L. Rev. 293 (1924) ..... 26
Taft, William H., 18 Yale L. J. 28, 32, 72 Cent. L. J. 191 ..... 26
West Virginia Law Quarterly (1929), Vol. 35, p. 301 ..... 26
Yale Law Journal, Vol. 41, pp. 262, 266 ..... 31

## Constitutions, Statutes, and Laws Cited.

Constitution of the United States, Article III, Section 2 2, 21
Judicial Code, Sec. 237 ..... 2
Tennessee Public Acts 1923, ch. 29 ..... 16
Tennessee Public Acts 1923, ch. 58 ..... 1, 15
U. S. C. A., Title 28, Sec. 344 ..... 2

# Supreme Court of the United States

OCTOBER TERM, 1932

No. 176

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, *Appellant*

*v.*

ROY C. WALLACE, Comptroller of the Treasury of the State of Tennessee, et al., *Appellees*

## BRIEF OF EDWIN M. BORCHARD AND CHARLES E. CLARK, AS *AMICI CURIAE*.

The Court in this cause issued on October 10, 1932, the following order: "Further consideration of the jurisdiction of this Court is postponed to the hearing upon the merits. The attention of counsel is invited to the question whether a case or controversy is presented, in view of the nature of the proceedings in the state courts."

The proceedings in the state courts were brought for a declaratory judgment.

### Preliminary Statement.

By chapter 58 of the Tennessee Acts of 1923, as amended (R. 14-16, 18-19), the State of Tennessee purported to exact an excise tax of two cents a gallon from each seller, storer,

or distributor of gasoline for the privilege of doing a gasoline business in Tennessee.

The complainant railroad uses gasoline in its railroad business and is obliged to store it occasionally and distribute it for subsequent use. The State Comptroller undertook to compel the railroad to pay a privilege tax in 1931 of $13,381.23 for the storing and distributing of gasoline. The railroad thereupon, on September 29, 1931, brought an action under the Tennessee Uniform Act on Declaratory Judgments for a declaratory judgment against the State Comptroller of the Treasury, the State Commissioner of Finance and Taxation, and the Attorney General, contending that it was not in the business of storing or distributing gasoline, that the gasoline was consumed in interstate commerce, and that the railroad was consequently exempt from the application of the statute and of the tax assessed thereunder. (R. 12-23).

The defendant, enforcing officials of Tennessee, demurred to the complainant's bill. While the procedural grounds of demurrer were overruled, the substantive grounds were sustained. (R. 7, 32.) Thereupon the complainant appealed to the Supreme Court of Tennessee, and on June 4, 1932, the decision below was affirmed.

Thus the complainant unsuccessfully claimed, and the defendant successfully denied, complainant's exemption from the statute, which the defendants were in process of enforcing by demanding the tax claimed to be due.

The question to which the attention of counsel is invited raises the problem whether the decision of the Supreme Court of Tennessee is "a final judgment or decree in any suit in the highest court of a state" under Judicial Code, Sec. 237, 28 U. S. C. A., Sec. 344, which, in turn, raises the problem whether the suit here is a "case" or "controversy" within the enumeration of the grants of jurisdiction to this Court under Article III, Section 2, of the Constitution of the United States. Had the suit been brought for an injunction, or for a declaration of immunity plus an injunction, to restrain the collection of the tax, it seems settled beyond dispute that it would then have been a "case" or "controversy."

*Graniteville Mfg. Co. v. Query*, 283 U. S. 376;
*East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465;
*State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S. 527;
*State Tax Commission of Mississippi v. Interstate Natural Gas Co.*, 284 U. S. 41;
*Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U. S. 147;
*Fox Film Corp. v. Doyal*, 286 U. S. 123.

The narrow limits of the issue presented may be seen by observing the prayers for relief of the appellant in its bill of complaint to the trial court and the decrees of both the trial court and the Supreme Court of Tennessee. After several prayers for findings by the court as to the invalidity of the tax assessed against it and of the statute under which the assessment is made, the complainant "further prays for such other, further and general relief as it may be entitled to in the premises." (R. 23.) The decree of the Chancery Court of Davidson County is that "the bill as amended be and the same is hereby dismissed," and that the defendants recover of the appellant and its sureties "all costs of this cause, *for which execution may issue.*" (R. 33.) (Italics ours.) The decree of the Supreme Court of Tennessee is that "the decree of the Chancellor be in all things affirmed and that the demurrer be sustained, the original bill be dismissed" and that the appellant and its sureties "will pay all of the costs of this cause, *for which let fi. fa. issue.*" (R. 9.) (Italics ours.)

Had the prayer for general relief included—or been construed to include—a prayer *"for an injunction,"* all the subsequent proceedings might have remained the same as at present, and yet this issue would not have been presented.

We do not analyze the pleadings in detail, for that has been done competently by counsel for the parties. They are important as showing that, whatever may be the technical legal requirements, actually there was a real issue between the parties as thoroughly contested on the points in dispute as it could be in any form of judicial proceedings. The de-

fendants, state officers, were claiming a certain sum of money from the complainant. The latter attacked the assessment against it with detailed and precise claims of invalidity. See Bill of Complaint, R. 11-23, with amendments, R. 28, 29. Defendants by demurrer attacked these claims both on grounds of procedure and of substance, R. 29-32. (The procedural grounds asserted in the demurrer do not go to the validity of the declaratory judgment but argue only that another remedy should have been used—a not unusual claim in tax cases even in answer to a prayer for an injunction against the collection of a tax.) The demurrer was sustained by the courts and the matters in dispute between the parties were definitely adjudicated.

## Question Presented.

The question presented is whether a state court judgment entered on a complaint asserting a claim of federal right and stated to be brought upon a statute authorizing the entry of declaratory judgments, though also praying for general relief, which judgment dismissed the complaint and awarded execution for costs to the defendants, is subject to review by this Court.

Although treated by the court below as a declaratory judgment, the name has no significance on this issue; nor is there involved the reviewability of all and sundry declaratory judgments which state courts may enter. The issue is limited to the one question whether *this particular judgment* was one upon a "case" or "controversy" within the rules of federal review.

## Summary of Argument.

I. Each State has general jurisdiction to regulate the procedure of its own courts.

II. Thirty-two states and territories, following the procedure well established in England and in other countries, have determined that the action for a declaratory judgment,

so-called, is a useful and necessary part of their court procedure and it is now in general use in these jurisdictions.

III. In the present case, the highest court of the State of Tennessee, following the procedure which it, in common with other states, has established as regular and proper, has made a final adjudication with reference to a Tennessee tax statute, binding upon all parties so far as the power of the state can make it so, and adjudicating costs against the appellant.

IV. A decision by this Court that the judgment of the Supreme Court of Tennessee is not subject to appeal, with the effect of rendering doubtful if not of nullifying an established procedure of a state court, is a control of state court procedure which this Court should not assume except under the compulsion of an overriding federal law.

V. There is no constitutional provision or adjudication of this Court requiring a decision that the state court judgment here in question is not subject to appeal; the contrary holding is more consistent with the due regard had by this Court for the sovereign powers of the states.

VI. Irrespective of any conflict between state and federal authority in this case, the procedure of courts, which is not an end in itself but only a means to the end of accomplishing justice, should be subject to modification and improvement as the need may appear and, in the absence of express provision, it should not be held controlled by the rigid and practically unchangeable limitations of a written constitution.

VII. The judgment of the Supreme Court of Tennessee in this particular action decides an actual controversy, is final, and is, therefore, subject to appeal.

## POINT I.

### Each State has general jurisdiction to regulate the procedure of its own courts.

It has been repeatedly held by this court that the judicial procedure by which private rights are contested in the states may be determined by each state for itself.

A state has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. *York v. Texas*, 137 U. S. 15 (1890).

When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a state over its methods of procedure is substantially unrestricted by the due process clause of the Constitution. *Jordan v. Massachusetts*, 225 U. S. 167 (1912).

> See also *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389 (1896);
> *Ex parte Reggel*, 114 U. S. 642 (1885);
> *Grand Rapids & Indiana Ry. v. Butler*, 159 U. S. 87 (1895);
> *Tripp v. Santa Rose Street Ry.*, 144 U. S. 126 (1892) ("The decision . . . below rests upon grounds of state procedure with which it is not our province to interfere");
> *West v. Louisiana*, 194 U. S. 258 (1904).

In the recent case of *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U. S. 151, at 158 (1931), this Court remarked:

> "It suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. . . . In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirement of reasonable notice and opportunity to be heard."

Neither of the parties herein has in its pleadings contended that the Tennessee procedure followed in this case deprived it of due process of law under the state or federal constitution. Such a contention could hardly be successfully advanced.

## POINT II.

**Thirty-two states and territories, following the procedure well established in England and in other countries, have determined that the action for a declaratory judgment, so-called, is a useful and necessary part of their court procedure and it is now in general use in these jurisdictions.**

Statutes authorizing courts of the states and territories of the United States to render declaratory judgments have been passed in 32 states and territories, as follows:

Arizona, 1927, (Uniform Act);
California, 1921;
Colorado, 1923 (Uniform Act);
Connecticut, 1921;
Florida, 1919;
Indiana, 1927 (Uniform Act);
Kansas, 1921;
Kentucky, 1922;
Massachusetts, 1929;
Michigan, 1929;
Nebraska, 1929 (Uniform Act);
Nevada, 1929 (Uniform Act);
New Hampshire, 1929;
New Jersey, 1924 (Uniform Act);
New York, 1921;
North Carolina, 1931 (Uniform Act);
North Dakota, 1923 (Uniform Act);
Ohio, 1931;
Oregon, 1927 (Uniform Act);
Pennsylvania, 1923 (Uniform Act);
Rhode Island, 1923;
South Carolina, 1922;
South Dakota, 1925 (Uniform Act);
Tennessee, 1923 (Uniform Act);

Utah, 1925 (Uniform Act);
Vermont, 1931 (Uniform Act);
Virginia, 1922;
Wisconsin, 1927 (Uniform Act);
Wyoming, 1923 (Uniform Act);
Hawaii, 1925;
Philippines, 1930;
Porto Rico, 1931 (Uniform Act).

The constitutionality of these statutes, which has involved an examination of every conceivable test of justiciability, has been established in eighteen states. The Michigan Supreme Court, which at first assumed that the statute required or permitted the court to render advisory opinions or decide moot cases without adversary parties [*Anway v. Grand Rapids Ry.*, 211 Mich. 592, 179 N. W. 350 (1920)], has in effect overruled that decision, after a clarification of the statute [*Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930)]. Except for the case now overruled, the states of the United States have been unanimous in upholding the constitutionality of these statutes.

*Arizona: Morton v. Pacific Constr. Co.*, 36 Ariz. 97, 283 Pac. 281 (1929);
*California: Blakeslee v. Wilson*, 190 Cal. 479, 213 Pac. 495 (1923);
*Connecticut: Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150, 152 (1923);
*Florida: Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930);
*Indiana: Zoercher v. Agler*, 202 Ind. 214, 172 N. E. 186 (1930);
*Kansas: State ex rel. Hopkins v. Grove*, 109 Kan. 619, 201 Pac. 82 (1921);
*Kentucky: Black v. Elkhorn Coal Corp.*, 233 Ky. 588, 26 S. W. (2d) 481 (1930);
*Michigan: Washington-Detroit Theater Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930);
*Nebraska: Lynn v. Kearney County*, 121 Neb. 122, 236 N. W. 192 (1931);
*New Hampshire: Faulkner v. City of Keene*, 85 N. H. 147, 155 Atl. 195 (1931);
*New Jersey: McCrory Stores Corp. v. S. M. Braunstein, Inc.*, 102 N. J. L. 590, 134 Atl. 752 (1926);

*New York: Board of Education v. Van Zandt,* 119 Misc. 124, 195 N. Y. S. 297 (1922), *aff'd,* 234 N. Y. 644, 138 N. E. 481 (1923);
*Pennsylvania: Kariher's Petition* (No. 1), 284 Pa. 455, 131 Atl. 265 (1925);
*Tennessee: Miller v. Miller,* 149 Tenn. 463, 261 S. W. 965 (1924);
*Virginia: Patterson's Ex'rs v. Patterson,* 144 Va. 113, 131 S. E. 217 (1926);
*Wisconsin: City of Milwaukee v. Chicago & N. W. Ry.,* 201 Wis. 512, 230 N. W. 626 (1930);
*Wyoming: Holly Sugar Corp. v. Fritzler,* 42 Wyo. 446, 296 Pac. 206 (1931).

In the other states the constitutionality of the statute has been taken for granted.

In the past ten years some seven hundred cases decided under these statutes have been reported. Over one hundred opinions appear in the various New York reports. Additional cases, not reported, have probably been brought to the various trial courts. This emphasizes the fact that a considerable number of issues have been determined, while indicating that the courts are not burdened by the procedure. The number of cases that could not have been brought under other forms, while perhaps the most important of all, are relatively few.

Appendix I, *infra,* p. 33, contains a few notes on the history of the procedure in England and its availability in various types of disputes, including those involving taxation, while some of the cases in which the declaratory judgment has been expressly approved by the courts are listed in Appendix II, *infra,* p. 39. Appendix III, *infra,* p. 43, gives a bibliography of articles upon the subject.

An examination of the reported cases shows that under the declaratory judgment statutes the parties may secure a prompt adjudication of their rights, without requiring—although permitting—a prior breach or violation. They have been especially used to accord judicial relief against peril and insecurity in legal relations. On the whole, they have followed the English practice and the interpretation of the English Supreme Court Rules of 1883. So trifling was the British amendment instituting the procedure that it was effected by

mere rule of court. In fact, it was a power always inherent in courts, especially courts of equity, and exercised from time immemorial in actions to quiet title, to declare marriages valid or void, to determine disputed titles to property, to construe wills and written instruments, to determine priorities and the existence or non-existence of liens.

*Distinctive characteristic of declaratory judgment.* The judgment for a declaration of rights or declaratory judgment differs in no respect from a condemnatory or executory judgment for coercive relief, such as damages, injunction, or specific performance, except in the fact that the judgment carries no coercive decree or order. "The distinctive characteristic of the declaratory judgment is that the declaration stands by itself; that is to say, no executory process follows as of course." *Kariher's Petition (No. 1)*, 284 Pa. 455, 131 Atl. 265, 268 (1925).

Execution, however, is not a part of the judicial function of adjudication of contested rights.

> *Fidelity Nat. Bank & Trust Co. v. Swope*, 274 U. S. 123;
> *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716.

*The declaratory judgment involves and implies an actual controversy.* An action for a declaration of rights, as actively practiced in all countries having Anglo-Saxon traditions, must, to be admissible, involve a controversy between adverse parties having an immediate and material interest in the adjudication of their rights, which are definitely established, determined, and declared by the judgment.

> *Hess v. Country Club Park*, 296 Pac. 300 (Cal. App. 1931);
> *Kariher's Petition (No. 1)*, 284 Pa. 455, 131 Atl. 265 (1925);
> *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930).

As stated by the Supreme Court of Tennessee in *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1924):

> "As to the necessity of a *bona fide* controversy as to which the judgment will be *res judicata*, it was announced in *Russian Commercial and I. Bank v. British Bank* (Eng.), reported in 19 A. L. R. 1101, that the rule in Scotland, where the action of declarator has existed for hundreds of years, is that the question must be a real, and not a theoretical, question; the person raising it must have a real interest to raise it; he must be able to secure the proper contradicter, that is to say, some one presently existing who has a true interest to oppose the declaration sought." (pp. 484-485.)

An examination of state declaratory judgments in which statutes and ordinances have been reviewed for constitutionality, construction, or interpretation discloses that almost without exception they involved issues of law, without any dispute as to the facts.

The courts have been watchful to avoid an adjudication or declaration of rights, if any of the elements of a justiciable controversy was lacking. Thus, cases have been dismissed for lack of justiciable controversy, either because of want of the necessary legal interest in the issue on the part of the plaintiff or defendant,

*Williams v. Flood*, 124 Kan. 728, 262 Pac. 563 (1928);
*Purity Oats Co. v. State*, 125 Kan. 558, 264 Pac. 740 (1928);
*Garden City News v. Hurst*, 129 Kan. 365, 282 Pac. 720 (1929);
*In re Annexation of Part of Lancaster Township to City of Lancaster*, 6 D. & C. 36 (Pa. 1924);
*Bell Telephone Co. v. Lansdowne Borough*, 18 Dela. Cy. 307 (Pa. 1927) (plaintiff challenges zoning ordinance, because he *might* want to buy in restricted area);
*Perry v. City of Elizabethton*, 160 Tenn. 102, 22 S. W. (2d) 359 (1929).

or because the parties were not adverse in interest,

*Crawford v. Favour*, 34 Ariz. 13, 267 Pac. 412 (1928);

*Reese v. Adamson*, 297 Pa. 13, 146 Atl. 262 (1929);
*Wagner v. County of Somerset*, 96 Pa. Super. Ct. 434 (1929);
*Public Defense Ass'n v. Allegheny County*, 6 D. & C. 182 (Pa. 1924);
*Cummings v. Shipp*, 156 Tenn. 595, 3 S. W. (2d) 1062 (1928).

or because the facts were not sufficiently ripe for judicial decision, in which event the judgment would merely have been an advisory opinion,

*Crawford v. Favour*, 34 Ariz. 13, 267 Pac. 412 (1928);
*Hayden Plan Co. v. Friedlander*, 97 Cal. App. 12, 275 Pac. 253 (1929);
*Lisbon Village Dist. v. Town of Lisbon*, 85 N. H. 173, 155 Atl. 252 (1931);
*cf. Mason's Adm'r v. Mason's Guardian*, 239 Ky. 208, 39 S. W. (2d) 211 (1931);
*In re Freeholders of Hudson County*, 105 N. J. L. 57, 143 Atl. 536 (1928);
*Lockwood v. Baird*, 59 N. D. 713, 231 N. W. 851 (1930);
*Ladner v. Siegel*, 294 Pa. 368, 144 Atl. 274 (1928).

or because in the court's discretionary view, there was an absence of certain parties deemed necessary to the suit,

*Denver Land Co. v. Moffat Tunnel Impr. Dist.*, 87 Colo. 1, 284 Pac. 339 (1930);
*Coke v. Shanks*, 209 Ky. 723, 273 S. W. 552 (1925);
*Additional Law Judge*, 53rd Jud. Dist., 10 D. & C. 577 (Pa. 1927);
*Cummings v. Shipp*, 156 Tenn. 595, 3 S. W. (2d) 1062 (1928).

or because the court's judgment would not have finally settled the issue,

*Additional Law Judge*, 53rd Jud. Dist., 10 D. & C. 577 (Pa. 1927).

or because the court was not in a position to make its judgment effective.

*State ex rel. Baird v. Board of Commissioners of Wyandotte County*, 117 Kan. 151, 230 Pac. 531 (1924).

The procedural and substantive requisites of justiciability are evidently watched as closely in a suit for a declaratory judgment as in a suit for any other form of relief. It is, however, true that a citizen directly threatened with a criminal penalty under a statute or ordinance may challenge the validity of the legislation before he commits the forbidden act and incurs the penalty.

*Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927);
*Pathé Exchange, Inc. v. Cobb*, 202 App. Div. 450, 195 N. Y. S. 661 (1922), *aff'd*, 236 N. Y. 539, 142 N. E. 274 (1923) (that plaintiff's "news reel" was not subject to censorship);
*Erwin Billiard Parlor v. Buckner*, 156 Tenn. 278, 300 S. W. 565 (1927);
*Utah State Fair Ass'n v. Green*, 68 Utah 251, 249 Pac. 1016 (1926) (privileged to conduct horse race without danger of prosecution).

Whether such a suit is "premature" depends upon the nature of the plaintiff's interest in an immediate decision, and this criterion of "legal interest" of the plaintiff is one of the major tests of justiciability in the states and in foreign countries. Justiciability is not conditioned upon prior violence, nor is it necessary, in order to challenge the constitutionality or construction of legislation, first to violate it.

"They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights." *Terrace v. Thompson*, 263 U. S. 197, at 216. See also *Pennsylvania v. West Virginia*, 262 U. S. 553, 591, 593. See discussion and cases in 45 Harv. L. Rev. 793, 839 (1932).

*The declaratory judgment differs fundamentally from an advisory opinion or a moot case.* An issue premature, obsolete, academic, hypothetical, or abstract will not be determined by an action for a declaration of rights.

*Williams v. Flood*, 124 Kan. 728, 262 Pac. 563 (1928);
*In re Cryan's Estate*, 301 Pa. 386, 152 Atl. 675 (1930);
*Hess v. Country Club Park*, 296 Pac. 300 (Cal. App. 1931);
*Kelly v. Jackson*, 206 Ky. 815, 268 S. W. 539 (1925);
*Perry v. City of Elizabethton*, 160 Tenn. 102, 22 S. W. (2d) 359 (1929);
*Reese v. Adamson*, 297 Pa. 13, 146 Atl. 262 (1929);
*Fox v. Title and Trust Co.*, 129 Ore. 530, 277 Pac. 1003 (1929).

In Appendix I, *infra*, p. 33, there are given illustrations of a great variety of actions, such as those concerning marriage, wills, to quiet title, to declare the nullity of instruments and the like, which are essentially declaratory in nature. These illustrations are cited merely to indicate that common law and equity procedure have long been familiar with actions which in reality seek declaratory judgments. The action involves not a matter of jurisdiction, but of procedure only, relating, in fact, only to the prayer for relief.

*The nature of the prayer for relief is not the criterion of "cause of action," "case," or "controversy."* The prayer for relief is not the criterion of a cause of action, or of a "case" or "controversy." The cause of action is the aggregate of operative facts, including the defendant's conduct, affording ground or occasion to obtain or secure judicial relief of some kind. Under the code form of pleading, followed in thirty jurisdictions, by express statute the prayer for relief does not limit the judgment to be rendered, where the action is defended. It is, therefore, well settled that the prayer for relief is no part of the cause of action.

See *e. g. Marquat v. Marquat*, 12 N. Y. 336 (1855);
*Durham v. Rasco*, 30 N. M. 16, 227 Pac. 599, 34 A. L. R. 838 (1924);
Cases collected in 31 Cyc. 110 by E. R. Sunderland, and 49 C. J. 173;
*American Digest Series, Pleading*, sec. 72;
*Clark, Code Pleading*, 179, 184.

The prayer for relief is designed to afford judicial protection, and a declaratory judgment may afford such relief as ade-

quately as any other form. If a plaintiff finds in a declaration of rights sufficient judicial protection, the interests of the administration of justice have been satisfied. The court may properly demand the presence of the requisites of justiciability, such as jurisdiction, capacity of the parties to sue and be sued, and the employment of authorized forms of procedure; and before rendering judgment, it must be satisfied of the substantive soundness of the complaint, that the subject-matter in issue is capable of legal protection and that the parties have in the issue a definite adverse material legal interest which is conclusively affected by the judgment. When such requisites are found to exist, the resulting judgment is as complete and binding as any other form of judgment, and is so regarded by the various state courts. See also Appendix I, *infra*, p. 33.

## POINT III.

**In the present case, the highest court of the State of Tennessee, following the procedure which it, in common with other states, has established as regular and proper, has made a final adjudication with reference to a Tennessee tax statute, binding upon all parties so far as the power of the state can make it so, and adjudicating costs against the appellant.**

The Tennessee judgment in this case is a final determination in Tennessee of the rights of the complainant railroad and the defendant taxing officials. The Supreme Court of Tennessee, after appropriate pleadings in customary form, has determined and declared that the complainant, contrary to its contentions, is subject to the Tennessee tax Act of 1923, as amended. That is a final adjudication "by such regular proceedings as are established *by law* or custom for the *protection* or enforcement of rights" and satisfies every condition of Mr. Justice Field's celebrated definition of the concept "cases" or "controversies" [*In re Pacific Railway Commission*, 32 Fed. 241, 255 (C. C. N. D. Cal. 1887)]:

> "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. Whenever the claim of a party under the constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The federal constitutional immunities which the complainant pleaded as a ground for the invalidity of the state tax statute in its application to the complainant, were conclusively denied by the Tennessee court, and that is the basis for the present appeal to this Court.

The Tennessee declaratory judgment statute states (section 1) that "such declaration shall have the force and effect of a final judgment or decree." (Tennessee Public Acts 1923, ch. 29.)

An examination of the Tennessee statute also indicates that, like other declaratory judgment statutes, the declaratory judgment may be used as an alternative remedy, that is, alternative to more coercive relief, as in the case at bar.

Experience has shown that a declaration of rights in practically all cases terminates the controversy and that defendants, where placed under duties by the declaration, have not refused compliance with the court's decision. Should that, however, happen, Section 8 provides that "further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." The court, moreover, has a discretion in declining to render the declaration where in its opinion it "would not terminate the uncertainty or controversy giving rise to the proceeding." (Sec. 6.)

An examination of the Tennessee statute would seem to make it clear that it contemplates only an adversary proceeding in an actual case and controversy involving material interests which are definitely affected by a decision, final and *res judicata* in all respects. Some of the statutes seek further

to remove all doubt on this point, created by the now overruled decision in the *Anway* case, by prefixing to Section 1 the clause "in cases of actual controversy." The prefix was unnecessary, for acquaintance with the statutes and their origin in England indicates that an action for a declaration cannot possibly lie in any other case than one involving a controversy in its most traditional sense.

## POINT IV.

**A decision by this Court that the judgment of the Supreme Court of Tennessee is not subject to appeal, with the effect of rendering doubtful if not of nullifying an established procedure of a state court, is a control of state court procedure which this Court should not assume except under the compulsion of an overriding federal law.**

The question at issue appears in form as one calling for an adjudication by this Court on its appellate jurisdiction under the Federal Constitution. The form should not, however, serve to conceal the important substantive problems which are immediately in the background. If by the words of the Constitution or by its implicit meaning as expounded by adjudications of this Court there is a clear answer to the question, we should have no reason for going further, however unfortunate the consequences. There is actually not such an answer. (See Point V, *infra*, p. 20.) As bearing upon the proper interpretation of the constitutional provision, therefore, we think it most important to consider what would be the meaning of the answers which this Court may make.

An answer that the Tennessee judgment is subject to appeal will permit the adjudication of the important constitutional and other questions upon which the parties are at issue. It will also mean that this Court will not deny to a declaratory judgment which adjudicates an actual dispute that finality which is guaranteed it by the state court. But it will not guarantee the finality of all declaratory judgments, nor fore-

close consideration of the existence of the requisites of justiciability in other cases as they arise. It will also leave open for future adjudication if and as the question may arise, the validity of an attempted grant by the Congress of jurisdiction to the federal district courts to render declaratory judgments.

A contrary answer will, of course, postpone to some other proceeding an adjudication by this Court of the ripened dispute existing between these parties. In addition, it will have the most important consequences, not all of which can be foreseen at the present time, upon the practice and procedure of the thirty-two states and territories concerned, and upon others which may adopt the declaratory judgment in the future. In the event of a contrary answer, a plaintiff could apparently prevent removal to a federal court or prevent federal review by suing in a state court for a declaratory judgment. See 100 Central Law Journal 95 (1927).

It is clear also that in these jurisdictions a judgment involving a federal question, which is *res judicata* and binding upon the parties so far as all the agencies of the state are concerned, will be of undetermined validity and scope with respect to the federal government. Perhaps it is a nullity, in which event very real conflicts of jurisdiction and power between the two sovereignties are quite possible if not probable. Or it may be, as in form it appears to be, merely a refusal by this Court to consider the appeal, with the judgment then binding upon all concerned. In either case it seems possible for a state court to make a judgment *against a federal right* which will stand unchallenged. Thus, the issue set at rest by *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816), that a state court cannot interpose its judgment against that of this Court on a question of federal right (there of title under a treaty with a foreign country), may be revived.

On the other hand, it does not seem possible that the declaratory judgment can be without some effect in federal tribunals, for vested rights will be affirmed by such judgments and action taken thereon by the parties, or by the courts by way of later coercive relief based upon the judgments. Rights thus affirmed or acquired cannot be disaffirmed and set at

naught but will be subject to protection by the courts. Whether rights have been thus acquired, and their extent, will probably have to be determined in individual cases by adjudications, at least some of which will be subject to review by this Court under the Fourteenth Amendment or otherwise. The jurisdiction thus declined in the present instance may ultimately be obtained under situations less direct than this, as well as more costly in delay and uncertainty to the parties. Moreover, cases excluded from this Court as declaratory judgments in state courts may find their way into the federal district courts as actions for coercive relief involving federal questions.

These dilemmas and complications seem to us real ones and not unnatural results of a decision which, without directly holding that the state procedure is invalid, indirectly does so hold. Of course it is to be anticipated that in some form or other the federal construction of the declaratory judgment procedure will be persuasive if not prevailing. So great is now the power and prestige of the federal authority and of this Court that if the controversy of *Martin v. Hunter's Lessee* appears to be revived at all, it will be settled without question, and settled as it was before. How this can be done without friction is not so clear. A natural consequence will be a hesitation on the part of litigants and a reluctance on the part of state courts to adopt a procedure which may be called in question by this Court. It seems inevitable that an adverse decision by this Court will check what to date has been a rapid spread of a procedural reform. The commanding position of this Court may indeed lead the states or their courts to discard the use of a remedy as to the validity and efficacy of which in state court procedure, legislatures and courts (except for the early Michigan case now overruled) as well as commentators have been unanimously agreed (see Appendix III). The responsibility of this Court is great, both for the immediate and the more remote consequences of its decisions. Here is a situation where an adverse decision will affect and probably change the local procedure of many states. In the exercise of wise statesmanship the Court may properly shrink from accepting such responsibility.

## POINT V.

**There is no constitutional provision or adjudication of this Court requiring a decision that the state court judgment here in question is not subject to appeal; the contrary holding is more consistent with the due regard had by this Court for the sovereign powers of the states.**

In several cases this Court has had occasion to refer to the declaratory judgment procedure. In none of them was the present question at issue.

In *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, and in *Willing v. Chicago Auditorium Asso.*, 277 U. S. 274, the Court held that the United States District Courts could not give a declaratory judgment. No question as to the power of a state court to give a declaratory judgment was in issue. In those cases, moreover, this Court took the position that the facts of those cases presented no contested issue. The question as to the validity of a grant of power by Congress to the federal district courts to render declaratory judgments, is quite different from the one presented in this case. Regardless of the attitude of this Court towards the power in Congress to authorize this procedure for the federal courts, it may yet properly be unwilling to interfere with such an authorization by a state to its courts.

*Liberty Warehouse Co. v. Burley Tobacco Growers*, 276 U. S. 71 (1928), decided important questions concerning the law of co-operative marketing. It also considered a point of practice with reference to the Kentucky declaratory judgment law. Defendant had presented an amended answer and counterclaim in three sections, in the last of which it asked for a declaratory judgment. The trial court struck section three "from the records" and this action was affirmed by the Court of Appeals of the State of Kentucky. This Court said (p. 88):

> "No Federal right was impaired by striking section three from the amended answer and counterclaim. Proceedings in state courts must conform to the reasonable requirements of local law. Whether they do is primarily

for those courts to determine. Here we find no abuse of that power."

It is submitted that this is a concise and accurate statement of the attitude of this Court, consistently maintained, toward the regulation of local procedure.

The Court also suggests that the Kentucky statute apparently authorizes plaintiffs only to ask for such judgments. It also refers to the provisions of that act (which are quite usual, see pp. 11, 16 *supra*) giving the court discretion to refuse the declaration in cases where the decision would not terminate the uncertainty and the controversy, or the declaration is not necessary and proper at the time under all the circumstances.

The Court ended its discussion of this matter by the following statement at the close of the paragraph dealing with the power of the Kentucky court as to such judgments in counterclaims and its discretion to refuse the declaration: "This Court has no jurisdiction to review a mere declaratory judgment," citing the *Grannis* case, *supra*. The Court could not have intended by this brief statement to pass upon the present issue, which was not involved and which was not briefed by counsel, or to foreclose an examination in the light of the exact problem and the consequences of the decision as presented in this case.

These cases, therefore, do not decide the present issue.

Article III, section 2, of the Federal Constitution, under which the issue arises, contains an enumeration of the grant of federal jurisdiction, listing different classes of "cases" or "controversies" within such jurisdiction. Construed as granting only the jurisdiction expressly stated, this provision has been held limited in application to "cases" or "controversies." Even so construed, it cannot be considered as intended to exclude all the innumerable new forms of proceedings which have been developed as a part of the modern administration of justice. For example, this Court has recently held that the review of a decision of the Board of Tax Appeals did present a "case" or "controversy" under Article

III of the Constitution. *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716.

The opinion in that case cites *Muskrat v. United States*, 219 U. S. 346, 356, and quotes again the requirements stated by Mr. Justice Field, in *In re Pacific Railway Commission*, 32 Fed. 241, 255 (1887):

> "Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The record here shows how completely the present action fulfills these requirements. Here are parties adverse to each other whose contentions concerning the Constitution of the United States are submitted to the court for adjudication in the most thorough fashion. It shows, too, the difference between the judgment here rendered, which is binding upon the parties at issue, and the advisory opinion of the *Muskrat* case, the vice of which was that it did not and would not conclude private litigants. The distinction between the advisory opinion of the *Muskrat* case and the declaratory judgment was stated by Mr. Chief Justice Hughes in 1920 as reported in 45 A. B. A. Rep. 266, 91 Cent. L. J. 435, and 53 Chicago Legal News 205 (1921).

Further support of these views may be found in

(1) the persuasive force of the various state court decisions listed pp. 8, 9 *supra* upholding the validity of the declaratory judgment procedure under the provisions of state constitutions;

(2) the reluctance of this Court, as stated in Point I of this brief, which is reaffirmed in *Liberty Warehouse Co. v. Burley Tobacco Growers*, 276 U. S. 71 (1928), as quoted on p. 20 *supra*, to attempt to control matters of state court procedure;

(3) the various cases where this Court has affirmed or rendered judgments declaratory in form and effect.

The last point here noted seems to us very important. We have already pointed out the narrowness of the question here involved. The Tennessee decree in question adjudicates the disputed issue, gives judgment for the defendants, and awards them execution for the costs of the action. Had the prayer for general relief contained also, or been construed to contain, a claim for an injunction, all other proceeding in the case including the judgment might have remained as they now are and yet the finality and reviewability of the judgment would not have been subject to question.

In the decisions of this Court cited immediately below we recognize the possibility of technical grounds of distinction from the case at bar. Yet we submit that the difference is only one of the barest and slightest character. In essentials the actions here referred to are declaratory in nature. It is true that they have the force of either legal tradition or of statute behind them; but the latter at least, if not the former, the declaratory judgment procedure now has.

Thus, the Court itself has made "binding declarations of right" without further relief, in a considerable number of cases. A common example is the decision determining the location of a disputed but existing boundary in suits between states.

> *Louisiana v. Mississippi,* 202 U. S. 1;
> *Arkansas v. Tennessee,* 246 U. S. 158;
> *Georgia v. South Carolina,* 257 U. S. 516;
> *Oklahoma v. Texas,* 272 U. S. 21 ("original suit brought by Oklahoma against Texas, to establish their boundary on the Red River").

In *La Abra Silver Mining Co. v. United States,* 175 U. S. 423, an action was brought by the United States, under statutory authority, for a judicial declaration that an award made by the Mexican-American Arbitral Tribunal in favor of La Abra Company, an American corporation, had been obtained by fraud. No consequential relief was asked, and necessarily none could be given, for the money awarded was in the hands of the Secretary of State awaiting distribution. In *United States v. Jones,* 119 U. S. 477, the appellate jurisdiction of the court was held to extend to a judgment of the Court of

Claims, which was no longer subject to revision by the Secretary of the Treasury, but was final on the merits, although necessarily the court had no power to enforce its decision by writ of execution. In *Gaines v. Fuentes*, 92 U. S. 10, a suit was brought to declare void a certain will, as well as to set aside the decree admitting it to probate. In *Smith v. Adams*, 130 U. S. 167, a proceeding was brought in the territorial court of Dakota to pass upon an election for and to declare the location of a county seat. In *Sharon v. Tucker*, 144 U. S. 533, the court sustained a bill to declare valid the title of a holder of real estate by adverse possession against a record holder whose title had become unenforceable by the running of the statute of limitations. In *Fidelity National Bank & Trust Co. v. Swope*, 274 U. S. 123, this Court held *res judicata* a prior action in the state court by the holder of certificates constituting a lien for public improvements to have the certificates and the statutory proceedings for the improvements declared valid. All these cases were deemed to constitute cases and controversies in a constitutional sense.

In Appendix IV, *infra*, p. 46, there are collected a large number of examples from recent cases in this Court of judgments which are in effect declaratory.

Proceedings may be brought for an injunction, the purpose of which is to bring an issue of law before the court for determination; yet actually in many of these cases an imminent and irremediable injury is not perceptible. The injunction merely affords a vehicle of submission, but the judgment desired and rendered is in many cases declaratory only. Cf. *Williams v. Riley*, 280 U. S. 78, 79.

A brief survey of recent Supreme Court reports indicates that the common form for praying immunity from the requirements of a statute, ordinance, or administrative order is to request that the official action be declared invalid, *and* that an injunction against its execution or enforcement be issued. The principal goal is the declaration of invalidity; the injunction is ancillary or incidental and generally is not needed. Justiciability lies in the respective assertion and denial of invalidity (or validity), and is not created by the appended request for an injunction. A large number of re-

cent cases of this type are collected in Appendix V, *infra*, p. 48.

We submit, therefore, that both by theory and by practice the Tennessee judgment in this case should be held subject to review in this Court.

## POINT VI.

**Irrespective of any conflict between state and federal authority in this case, the procedure of courts, which is not an end in itself but only a means to the end of accomplishing justice, should be subject to modification and improvement as the need may appear and, in the absence of express provision, it should not be held controlled by the rigid and practically unchangeable limitations of a written constitution.**

Flexibility in procedure is an element now considered essential in law administration. Hence it is a universally accepted tenet of procedural reform that control of procedural rules shall be placed where they can be adjusted most readily to the needs of law administration as they appear. The rules of the contest are not an end in themselves but only a means to an end and they should be shaped and reshaped to secure that end most effectively. The idea has been well phrased by an able English judge, Collins, M. R., in *In re Coles*, [1907] 1 K. B. 1, 4, that "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress."

The modern movement which best epitomizes this idea is that for rule-making power in the courts. It is proposed that the legislature shall prescribe the broad outlines of practice and leave to the courts the development and amendment of detailed rules. Such is the practice followed with success in England (see Rosenbaum, The Rule-Making Authority in the English Supreme Court, 1917); and the literature in support of similar proposals for this country is most extensive. For bibliographies of the subject see

16 Am. Bar. Ass'n Jour. 199-202 (1930);
73 Annals Am. Acad. of Pol. & Soc. Science, 68-77 (1917);
12 Am. Bar. Asso. Jour. Supp., March, 1927;
Rep. on Judicial Councils, Com. on Jud. Adm. of the Merchants' Ass'n of New York (1931) 95-123;
Clark, Code Pleading (1928) 32.
Compare particularly statements of Roscoe Pound in 10 Ill. L. Rev. 163, 170, 177, and William H. Taft in 18 Yale L. J. 28, 32, 72 Cent. L. J. 191.

There is a standing committee on the subject of the Conference of Bar Association Delegates of the American Bar Association. Statutes conferring broad rule-making power upon the courts exist in several states, as in Delaware (1925), Florida (1929), Rhode Island (1930), Virginia (1928), Washington (1925), and Wisconsin (1929). Such statutes have been upheld as constitutional in *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 Pac. 770 (1928), and *In re Constitutionality of Section 251:18, Wisconsin Statutes*, 204 Wis. 501, 236 N. W. 716 (1931).

It has been considered that even this power does not alone secure sufficient flexibility and response to public needs, but that there should be an additional body such as the judicial council or a "ministry of justice" to stimulate the exercise of the power.

Compare E. R. Sunderland, *The Machinery of Procedural Reform*, 22 Mich. L. Rev. 293 (1924);
also 35 W. Va. L. Q. 301 (1929), 39 Harv. L. Rev. 725 (1926);
Mr. Justice Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113 (1921), reprinted in Law and Literature (1930);
T. W. Arnold, *Judicial Councils*, 35 W. Va. L. Q. 193 (1929);
*Bibliography on Judicial Councils*, 24 Law Library Journal 25, 65 (1931).

The control of procedure by the unbending provisions of a written constitution is directly contrary to this movement.

It would mean as a practical matter that law administration cannot be adapted to the needs of justice as they appear from time to time but that the rules embedded in the constitutional provisions become themselves ends which must be honored at the expense of all else. The declaratory judgment procedure well illustrates the point. This reform concerns particularly the method of getting issues decided judicially and is not an end in itself. The end desired in these cases is an adjudication of important rights at issue between parties litigant. We have shown how in many different types of cases such an adjudication can be obtained if some slight additional prayer is joined with the prayer for the declaration. The declaration, however, remains the important thing desired. To erect this slight and technical difference into a constitutional dogma is at variance with the modern attitude towards procedure. It should not be done in the absence of a clear direction in the Constitution.

Experimentation by the several states with a view to improvement of law administration is fully as important as experimentation with new types of substantive legislation.

In many of the cases where the declaratory judgment procedure is now being used, the parties probably could avoid the issue now raised by asking for coercive relief also. Thus, a technical barrier is interposed to prevent a declaration of rights; this can often be overcome by technical devices of avoidance. But we submit that even so, the Constitution should not be construed to provide such barriers. At times it will be impossible to evade them. Where it is possible to do so, there are sound reasons why both parties and court may prefer the declaratory judgment. The parties may often properly hesitate to take the decisive, incriminating, and irretrievable step necessary to place themselves in a position to seek coercive relief. Thus, they may be unwilling to disregard a contract about the provisions of which they are in doubt and dispute; or they may desire to refrain from flouting a statute defining a criminal offense when its meaning and validity are not settled. It seems unnecessary if not undignified for a sovereign authority to force its constituents

to such steps in order to secure an adjudication of their rights, and a court may well feel reluctant to do so.

As already observed, a usual and popular use of the procedure is in connection with a claim for other relief. A party seeking coercive relief will also add a prayer for a declaration of rights. Here too the motive is obvious and reasonable. A decision on the issue as to the coercive relief alone may not settle the entire case, either because such relief is not available for technical reasons in the particular case or because the granting of such relief does not involve all the issues in dispute. With the added prayer for a declaration in the complaint the court may adjudicate the entire matter at issue between the parties in such a way that neither it nor the parties themselves are forced to the time, trouble, and expense of further litigation. Such use of the declaratory judgment is quite usual in New York, for example. Recent instances are

*Baumann v. Baumann,* 250 N. Y. 382, 165 N. E. 819 (1929);
*Evangelical Lutheran Church of the Ascension, of Snyder, N. Y. v. Sahlem,* 254 N. Y. 161, 172 N. E. 455 (1930);
*Gwynne v. Bd. of Educ'n of Union Free School Dist.,* 259 N. Y. 191, 181 N. E. 353 (1932);
*Colson v. Pelgram,* 259 N. Y. 370, 182 N. E. 19 (1932).

See also the following cases where an injunction was denied but the declaration made and the rights of the parties determined.

*Erwin Billiard Parlor v. Buckner,* 156 Tenn. 278, 300 S. W. 565 (1927);
*Evans v. Manchester, Sheffield & Lincolnshire Ry.,* 36 Ch. D. 626 (1887);
*London Ass'n of Shipowners v. London & India Docks,* [1892] 3 Ch. 242;
*Attorney-General v. Merthyr Tydfil Union,* [1900] 1 Ch. 516;
*Deep Creek Gold Dredging Co. v. Gympic Quartz Crushing Battery Co.,* 8 Queensland L. J. 131 (1897);

The desirability of the general use of the declaratory judgment, subject, of course, to its inherent restriction to cases of actual disputes, has, so far as we can discover, been supported by every commentator, except one. An editorial note in 45 Harv. L. Rev. 1089 (1932), while approving of its use in matters of private litigation, as has that Review consistently in all other comments upon it, raises the question as to its utility for the presentation of federal constitutional questions of moment. The fear is expressed that the questions may not be thoroughly presented through this procedure. Even the limited restriction on its use thus suggested we believe is not supported by any realistic conception of the situation. We yield to no one in believing that constitutional questions should be adequately presented to this Court. Nevertheless, the situation should be viewed in a practical and not in a doctrinaire way. The care and thought with which constitutional questions may be presented to this Court will vary with the individual case and will depend more on the industry and ability of counsel than on any other single factor. It will depend very little on the form of the procedure. The present case indicates how a clear constitutional issue may be brought before the Court and ably presented by counsel. On the other hand, there is no guaranty that an adjudication requested with injunctive relief as ancillary thereto will result in a more complete or in a different presentation. Moreover, the court is fully competent to protect itself. We have cited many cases showing that the courts do exercise full discretion in refusing a declaration when the controversy is not ripe for it. And when the case is not thoroughly argued, the court is entitled to order a more thorough preparation of briefs and argument.

It should be noted also that the *Harvard* comment is directed against a federal declaratory judgment bill—not against this case. The fear is expressed of inadequate factual experience of statutes when issues involving their validity are presented to federal courts under Congressional authority. Such fear does not justify this Court's refusal to review such judgments

of state courts when as and if it is satisfied that a real controversy was decided.[1]

The fashioning of an issue for the purpose of providing a test case in important and famous constitutional cases is well known. Examples are

*Hylton v. U. S.*, 3 Dall. 171, 172 (1796) ("the defendant, by agreement of the parties, confessed judgment, as a foundation for the present writ of error; which (as well as the original proceeding) was brought merely to try the constitutionality of the tax");

*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 158 U. S. 601, 15 Sup. Ct. 912 (1895) (suit by a stockholder to prevent payment of the income tax in question by the corporation);

*Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394 (1923) (one of the two suits was by an employee to prevent the minimum wage board from establishing a minimum wage affecting her);

*O'Gorman & Young, Inc. v. Hartford Ins. Co.*, 282 U. S. 251, 51 Sup. Ct. 130 (1931) (suit by agents against the insurance companies to recover commission in excess of those permitted by the statute in question).

---

[1]The writer in 45 Harv. L. Rev. 1089 also suggests that the Court should have the opportunity of itself advancing the point at which it will determine the issue and that "the use of injunctive relief permits an easy advancement or retraction by the Court which the declaratory judgment may not allow." Whatever may be thought of this conception of the way in which constitutional issues should be treated by this Court, the actual suggestion completely confuses the scope of the two remedies. The award of injunctive relief is governed by well crystallized equitable principles; the grant of a declaratory judgment is subject to a far wider judicial discretion.

He also suggests that the Court should have the benefit of experience under legislation in passing on its constitutionality. Whether this, if obtainable, would outweigh the disadvantages of continued uncertainty until the constitutional issue is settled might be subject to question; but in any event we believe it a forlorn hope. It takes years before experience as to social legislation can possess significance. Note the twenty years between *Noble State Bank v. Haskell*, 219 U. S. 104 (1911), and *Abie State Bank v. Weaver*, 51 Sup. Ct. 252 (1931). And such experience will not be made available by any such mechanical expedient as requiring a declaration only with coercive relief instead of a declaration alone.

In such cases there is a very grave danger of a lack of a real adversary interest, and with no recognized way of guarding against it such as the declaratory judgment procedure possesses in the power to refuse to make the adjudication. (See 41 Yale L. J. 262, 266.) Judging by the cases decided under declaratory judgment statutes, such judgments might well have been refused in cases such as *Hylton, Pollock, Adkins,* and *O'Gorman,* for lack of a genuine, adverse interest in the defendant.

We submit, therefore, that this simple and effective procedural reform involving a reasonable variation and extension of present practice should be permitted in those states where its use is desired and in those cases where it has achieved its purpose of adjudicating a real issue. It should not be subject to the handicap of a constitutional amendment for its validity.

## POINT VII.

### The judgment of the Supreme Court of Tennessee in this particular action decides an actual controversy, is final, and is therefore, subject to appeal.

The only basis upon which this Court may proceed in raising any question as to its jurisdiction to review this case is that an actual controversy was not determined in this particular litigation. We submit that both legally and practically there is no question but that an actual bona fide dispute was here carried through to its final adjudication so far as the state court was concerned. Whether the declaratory judgment usually or always will lead to this result or what may be its effect in other cases is not here in issue. This case *did* reach the result of an adjudication of a controversy. Right to a review is a necessary consequence.

Should this Court deny review to this case despite the existence of a real dispute with adverse parties, a real danger arises that its jurisdiction will depend on a question of nomenclature only. That this action is brought under a

statute which calls the judgment declaratory should not prevent this Court from examining it to see whether a controversy is actually presented. Whatever a state may call its judgment, that examination is always open here. Approval of the procedure in this case will not commit this Court to approval of all cases brought to judgment in state courts under these statutes. And the Court has at hand means to enforce its requirements as to cases and controversies in each individual case without a general invalidation of the procedure as a whole.

We submit therefore that this judgment, deciding as it does an actual controversy, is final and subject to appeal.

Respectfully submitted,

EDWIN M. BORCHARD
CHARLES E. CLARK
*Amici Curiae*

# APPENDIX I.

## The Use of the Declaratory Judgment.

*History.* The action for a declaratory judgment is an ancient procedure, having been in use in the Middle Ages throughout all Europe.

> 28 Yale Law Journal 10 *et seq.;*
> Weismann, J. Die Feststellungsklage (Bonn, 1879).

It has been actively employed in Scotland as the "action of declarator" since the sixteenth century. The tribute paid to this form of action by Lord Brougham over many years and again in 1846, in delivering an opinion in the House of Lords in the case of *Earl of Mansfield v. Stewart*, 5 Bell 139, 160, led to its formal introduction in England by statute in 1852. It was, however, at first narrowly construed. The social and legal advantages of the simplified procedure in question led in 1883 to the adoption by the English Supreme Court of a Rule of Court greatly extending the scope of this procedure. (See 28 Yale L. J. 1, 25 *et seq.*) The Rule of 1883 reads:

> "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

The growing popularity of the procedure in England is attested by the fact that by page-to-page statistical count, approximately two-thirds of the cases reported in the Chancery Reports since 1918 have come up on an originating summons for a declaration of rights. Every one of them has involved a "case" and "controversy."

*The action for a declaratory judgment is not an innovation in procedure.* The action for a declaration of rights is by no means an innovation in procedure. From time immemorial, courts of the common law have rendered judgments determining the then existing rights of the parties, final judgments which are incapable of execution—such as the determination

of status or title—and the execution of which is undesired and unnecessary. All that is new or modern about the declaratory judgment is the name—the process itself is as ancient as the administration of justice by courts. Its formal adoption by legislation in the nineteenth and twentieth centuries merely evidences general recognition of its value in the complicated conditions of modern life which create increasing necessity for certainty, stability, and settlement.

In the field of status, the following actions are purely declaratory: actions for the declaration of the nullity of void marriages, of the validity of marriages, and for the formal establishment of family relationships, such as heirship; in the field of property, we have the equitable action to declare the non-existence of a cloud on title, the action by the person in adverse possession against the record holder to have the latter's title declared void and his own valid, the actions under the Torrens system for the determination of title, the actions for the location of boundary lines, rights of way or easements, and the existence of liens and claims to priority in bankruptcy and in corporate distributions; also the action by which an equitable claimant seeks a declaration that the defendant's property is impressed with a trust in his favor, or an action to declare a supposed trust invalid. In the field of written instruments, courts have long construed wills. Actions to declare the nullity of instruments, such as deeds, life insurance policies, conveyances in fraud of creditors, are nothing but declaratory; so are actions proving the tenor of lost or spoliated instruments or proving the validity, when contested, of instruments to be recorded. The proceedings authorized in western states by which commissioners of irrigation districts may bring actions for a judicial determination that the district is lawfully established and that the bonds issued are valid, are declaratory only; as this Court has said, in a bond validation case (*Fidelity Nat. Bank & Trust Co. v. Swope*, 274 U. S. 123, 131): "[The issues] cannot be any the less [a case or controversy] because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city." The equitable bill of interpleader brought by a stakeholder exemplifies a

common employment of an action looking to a declaratory judgment. The statutory action to limit liability in admiralty also seeks only a declaratory judgment.

*Utility of the declaratory judgment in suits contesting the validity of administrative action.* The action for a declaration is especially useful in actions against the administration, in which the citizen maintains that a statute or ordinance or administrative regulation violates his rights. With the ever-growing interference by government in the affairs of private individuals, it often becomes important to the individual to challenge the validity of the interference, authorized or actual, before it is physically enforced upon him. Statute, ordinance, or administrative regulation, with or without penalties for disobedience, may seriously impair individual freedom and material interests. In both England and the United States, where the remedy of injunction is subject to conditions and limitations of various kinds, the declaratory judgment has become a convenient method of testing the propriety, validity, or constitutionality of administrative action under statute or ordinance. As a rule, the mere enactment of a statute or ordinance imposing restraints on an individual and implying enforcement by prosecuting officials threatens and hampers the plaintiff's freedom, security, or material interests, and creates that justiciability of the issue which sustains a proceeding for an injunction and, *a fortiori*, for a declaratory judgment.

But even where a definite demand or threat by the defendant official is necessary to create justiciability, it is not to be supposed that a government official, the legality of whose act is challenged, requires more than a decision of a competent court on the disputed question of law, and that injunction to restrain or mandamus to command him is anything more than a mere formality. The decision, not the coercive order, settles the dispute. It seems anomalous that it should be deemed necessary for one branch of the government, the judiciary, forcibly to restrain or punish another branch or instrumentality of the government, in order to achieve respect for the declared law.

Hughes, C. J., in *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10, 18: "It is not necessary, however, that formal application should be made for such a writ [mandamus], as the District Judge may now proceed to take the action which the writ, if issued, would require."

So the German Supreme Court: "In the case of the State as defendant the distinction between a declaratory and an executory action is merely a formal one." R. G. Z., March 30, 1931, Jur. Wochenschr. v. 60, at 2483; R. G. Z., May 18, 1931, *ibid.* at 3263.

The simplest way is the best way to bring to judicial determination the challenged validity of governmental action allegedly violating individual rights; and experience has shown that the declaratory judgment serves that purpose admirably.

Cf. W. Ivor Jennings, *Declaratory Judgments against Public Authorities in England*, 41 Yale L. J. 407 (1932);

*Ruislip-Northwood U. D. Council v. Lee*, 145 L. T. 208 (K. B. 1931);

*Judicial Relief for Peril and Insecurity*, 45 Harv. L. Rev. 793, at 839 *et seq.* (1932).

## Immunity from taxation.

Freedom from any governmental requirement which is believed unlawfully to impair the privileges of the individual may likewise be judicially demanded in the form of a suit for a declaration of immunity. The plaintiff thus puts to the test a governmental action which threatens him with restrictions and often with a criminal prosecution. Among such actions is the claim of immunity from the requirement of a license or fee as a condition of doing business.

Another common claim of immunity is the immunity from taxation. It is often difficult to challenge the validity of a tax by injunction, and it is hazardous to invite a levy or await enforcement proceedings, with possible penalties. A practice has therefore developed of challenging the validity of a tax law or of an assessment thereunder by an action for a declar-

ation, a speedy method of determination which does not materially hamper the taxing power and which insures an authoritative determination on the propriety of the proposed exaction before it has been enforced. This proceeding may take the form of an attack upon the constitutionality or validity of the law,

*Frazier v. City of Chattanooga*, 156 Tenn. 346, 1 S. W. (2d) 786 (1928) (claim that law permitting assessment on property owners for improvements was repealed; denied);
*Universal Film Mfg. Co.* (Australia) *v. New South Wales*, 40 C. L. R. 333 (1927);
*Mason v. City of Victoria*, 26 Br. Col. 418 (1917).

or upon the validity of the assessment thereunder;

*Wilcox v. Town of Madison*, 106 Conn. 223, 137 Atl. 742 (1927) (assessment claimed out of proportion to real value of property and that classification wrong. Denied. *Certiorari* denied, 276 U. S. 606);
*Soergel, Jahrbuch d. Verwaltungsr. II*, 499 (Baden, March 23, 1909) (plaintiff could seek declaration against preliminary order on rate of assessment, without waiting for determination of taxable *res* [working capital]).

or the taxpayer may contend that he

*Parmer v. Lindsey*, 157 Tenn. 29, 3 S. W. (2d) 657 (1928) (plaintiffs claim immunity from privilege tax, not being "general contractors");
*Nash Sales, Inc. v. City of Milwaukee*, 198 Wis. 281, 224 N. W. 126 (1929) (interstate motor companies shipping in original packages claim exemption from state tax);
*Vaughn v. Attorney-General for Alberta*, 20 Alberta 424 (1924) (that plaintiff's deceased husband held vendor's deed in escrow only, hence not owner, and exempt).

or his property

*City of Louisville v. Cromwell, State Treas.*, 233 Ky. 828, 27 S. W. (2d) 377 (1930) (city claims ex-

emption on gasoline to be used in city vehicles);
*Peoples Tel. Corp. v. City of Butler*, 99 Pa. Super. Ct. 256 (1930) (that lot and building necessary for plaintiff's business, hence tax exempt);
*Automatic Totalisators Ltd. v. Federal Comm. of Taxation*, 27 C. L. R. 513 (1920) (dividends not cash prize in lottery, hence exempt);
*Macrae Mining Co. Ltd. v. Township of Bucke*, 58 Ont. L. R. 453 (1926) (that mining rights not merged with sold surface rights, hence exempt from tax on sale)

is exempt from taxation, or that the amount of the tax is unduly high or the classification improper.

*Cupp Grocery Co. v. Johnstown*, 288 Pa. 43, 135 Atl. 610 (1927) (plaintiff owner of 33 stores claims liability to only one license tax of $100 as a corporation, not $915 as assessed);
*Incorporated Council of Law Reporting v. Federal Comm. of Taxation*, 34 C. L. R. 580 (1924) (whether plaintiff liable as a person or corporation).

# APPENDIX II.

## Declaratory Judgments Approved — Selected Cases.

## I. American Cases.

*Braman v. Babcock*, 98 Conn. 549, 120 Atl. 150 (1923).

*Brown v. Levin*, 295 Pa. 530, 145 Atl. 593 (1929) (Plaintiff sought a declaration construing a restriction regulating the building line. At p. 534, the court referred to the declaratory judgment procedure "as the most inexpensive and expeditious method of adjusting the dispute.")

*Chick v. MacBain*, 157 Va. 60, 160 S. E. 214 (1931) (Plaintiff landlord sought declaration as to the amount of rent due under a lease provision on renewal which had been exercised. Campbell, J., remarked, at p. 66: "The fact that a plaintiff or complainant might, by the institution of an action or suit or series of actions or suits, eventually, through protracted and continuous litigation, have determined the same questions that may be determined once and for all in a declaratory judgment proceeding, has never, so far as we find, been held by the courts to deprive the court of jurisdiction to enter a declaratory judgment wherein the entire rights of the parties can be determined and settled once and for all.")

*Colorado & Utah Coal Co. v. Walter*, 75 Colo. 489, 226 Pac. 864 (1924).

*Craig, City Comptroller, v, Commissioners of Sinking Fund of City of New York*, 208 App. D. 412, 203 N. Y. S. 236 (1924) (Plaintiff sought a declaration as to the validity of a resolution for the sale of property in which he had not concurred. The court remarked, at p. 418: "It would be difficult to find a more appropriate case for the application of the law permitting declaratory judgments.")

*Dodge v. Campbell*, 128 Misc. 778, 220 N. Y. S. 262 (1927).

*Evangelical Lutheran Church of the Ascension, of Snyder, N. Y. v. Sahlem*, 254 N. Y. 161, 172 N. E. 455 (1930).

*Faulkner v. City of Keene*, 85 N. H. 147, 155 Atl. 195 (1931).

*Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 140 Atl. 506 (1928) (Plaintiff lessor sought a declaration construing a lease in view of plaintiff's offer, and defendant lessee's refusal, of a new building of given qualifications after destruction of the original building by fire.

At p. 524, the court remarked: "In a case like the present, by proceeding according to the Declaratory Judgments Act, the parties avoid the necessity of first actually erecting a building in order to be in a position to obtain a judicial construction of their respective rights and liabilities.")

*Hess v. Country Club Park*, 213 Cal. 613, 2 Pac. (2d) 782 (1931) (Plaintiff property owner sought a declaration as to the validity of a building restriction. At p. 616, the court remarked: "The pleadings in this case present a practical situation which calls for declaratory relief .... It is inconceivable that he must run the risk of forfeiting any further investment, or even his title to the land, in order to obtain an adjudication of his rights. It seems clear that the declaratory relief statute was intended to relieve a party from exactly such a dilemma.")

*Pacific States Corp. v. Pan-American Bank of California*, 213 Cal. 58, 1 Pac. (2d) 4 (1931).

*Post v. Metropolitan Casualty Ins. Co.*, 227 App. D. 156, 237 N. Y. S. 64 (1929) (Plaintiff creditor under judgments sought declaration defining rights under insurance policy in view of the insolvency of railroad company, which defendant insurance company had insured. Crosby, J., said, at p. 158: "It would be difficult to think of a situation wherein the purpose behind section 473 of the Civil Practice Act could find better vindication than the very situation we have here.")

*Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930).

*Sigal v. Wise*, 114 Conn. 297, 158 Atl. 891 (1932).

*State ex rel. Enright v. Kansas City*, 110 Kan. 603, 204 Pac. 690 (1922) (Plaintiff sought a declaration as to the right of defendant city to issue bonds for more than 5% without reserving the privilege of repaying within five years, in view of certain statutes. At pp. 605-6, the court remarked: "The proceedings in this case serve to illustrate operation of the declaratory judgment act.")

*Tennessee Eastern Electric Co. v. Hannah*, 157 Tenn. 582, 12 S. W. (2d) 372 (1928).

## II. Foreign Cases in English-speaking Jurisdictions.

*Burghes v. Attorney-General*, [1911] 2 Ch. 139 (Plaintiff claimed a declaration that a tax form issued by admin-

istrative officers was ultra vires and that he was under no duty to comply with it. Warrington, J., remarked, at p. 156: "In my opinion, the mode adopted by the plaintiff for obtaining a decision is a very convenient one, enabling the Commissioners to be informed how far they may go, and relieving the plaintiff from the doubt and perplexities into which he has been cast.")

*Dyson v. Attorney-General*, (*C. A.*) [1912] 1 Ch. 158 (Plaintiff sought a declaration that an administrative tax notice was invalid and that he was under no duty to comply with it. Cozens-Hardy, M. R., remarked, at p. 168: "Assuming the jurisdiction to exist, I cannot imagine a more proper case for its exercise. It is no light matter for the Commissioners to issue broadcast forms which purport to impose obligations which do not exist and which add a threat of penalty for non-compliance. A general declaration is pre-eminently desirable in these circumstances. And I am a little surprised that the Commissioners do not welcome a decision which will guide their action in the future. Their contention that no Court should interfere unless and until a penalty is sued for seems extravagant." Fletcher Moulton, J., remarked, at p. 168: "I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings.")

*Gray v. Spyer*, [1921] 2 Ch. 549, [1922] 2 Ch. 22 (Plaintiff landlord sought declarations fixing defendant tenant's option to renew and the validity of notice terminating the tenancy. On appeal, Lord Sterndale remarked, at p. 27: "The plaintiff's claim for a declaration was a convenient method of ascertaining the legal position of the parties without waiting for the time when notice terminated . . . . ")

*Guaranty Trust Co. of New York v. Hannay & Co.*, (*C. A.*) [1915] 2 K. B. 536.

*Ruislip-Northwood Urban Dist. Council v. Lee*, 145 L. T. 208 (K. B. 1931) (Plaintiff administrative officers sought declaration that defendant's "caravans" were temporary buildings within the meaning of certain public health

statutes. Mackinnon, J., the trial judge, found the declaration "appropriate" as opposed to an action for penalties or injunction after plaintiff had exercised an alleged right under statute to destroy them. On appeal both Scrutton, L. J., and Slesser, L. J., agreed that plaintiffs were entitled to a declaration. Greer, L. J., in concurring, remarked, at pp. 214-5: "If ever there was a case in which it is convenient and right that there should be on the part of a plaintiff a right to a declaration which will make it safe if he acts in accordance with his rights, that is the present case.")

*Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, (H. L.)* [1921] 2 A. C. 438 (Plaintiff borrower sought a declaration that it was entitled to the possession of certain bonds upon the repayment of the loan in rubles, and injunction. On appeal, Lord Dunedin remarked, at p. 448: "In my opinion, unless you are to rob declarations of much of their real value, this is a case in which a declaration ought to be given.")

*Société Maritime et Commerciale v. Venus S. S. Co.*, 9 Com. Cas. 289 (1904) (Plaintiffs claimed a declaration that a contract for loading ore was no longer binding on them. Channell, J., remarked: "Showing a necessity of a decision upon it, I think they are entitled to a declaration as to whether or not the contract is binding upon them. They are not bound at their peril to perform it and then be liable to heavy damages for not performing it for the space of the next one and one-half years.")

*Thomas Borthwick & Sons (Australasia) Ltd. v. Ryan*, [1932] N. Z. 225.

*West v. Gwynne*, 104 L. T. 759 (C. A. 1911) (Plaintiff lessee sought a declaration that defendant lessor could not impose conditions as to division of surplus rental upon his consent to sublet. Cozens-Hardy, M. R., remarked, at p. 761: 'I cannot imagine an instance of a more beneficial exercise of the jurisdiction to make a declaratory order than has been done in this case.")

# APPENDIX III.

## Bibliography.

**The following is a list of signed articles published in recent years:**


Arnold, H. C. *Declaratory judgments,* Pennsylvania B. A. Q. (1929) 14-18.

Borchard, Edwin M. *The constitutionality of declaratory judgments,* 31 Col. L. Rev. 561-616 (1931).

————. *The declaratory judgment—a needed procedural reform,* 28 Yale L. J. 1-32 and 105-150 (1918).

————. *The declaratory judgment in the United States,* 37 W. Va. L. Q. 127-148 (1931).

————. *Declaratory judgments,* 3 Cin. L. Rev. 24-39 (1929).

————. *Judicial relief for peril and insecurity,* 45 Harv. L. Rev. 793-854 (1932).

————, and Morrison, Phoebe. *Declaratory judgments in New Jersey,* 1 Mercer Beasley L. Rev. 1-29 (1932).

Boyd, T. M. *Declaratory judgments, development and application, the Virginia statute,* 15 Va. L. Rev. 79-86 (1928).

Cooper, Homer C. *Locking the stable door before the horse is stolen,* 16 Ill. L. Rev. 436-455 (1921).

Dodd, W. F. *The Michigan declaratory judgment decision,* 6 A. B. A. J. 145-147 (1920).

————. *Progress of preventive justice,* 6 A. B. A. J. 151-153 (1920).

Dunn, Frank K. *The declaratory judgment,* 45 A. B. A. Rep. 383-394 (1920).

Farabaugh, G. A., and Arnold, W. R. *Commentaries on the public acts of Indiana, 1927. I. The uniform declaratory judgments act,* 3 Ind. L. J. 351-364 and 444-459 (1928).

Gates, Elias. *Declaratory relief,* Tenn. Bar Assoc. Proceedings (1920) 41-51.

Gordon, Thomas R. *Declaratory judgments,* 93 Cent. L. J. 169-176 (1921).

————. *Declaratory judgments,* Ky. Bar Assoc. Rep. (1921) 192-224.

————. *The law of declaratory judgments and its progress,* 9 Va. L. Rev. 169-195 (1923).

Harrison, M. E. *California legislation of 1921 providing for declaratory relief*, 9 Calif. L. Rev. 359-373 (1921).

————. *Declaratory judgments in California*, 8 Calif. L. Rev. 133-150 (1920).

Hermosisima, H. S. *Declaratory judgments in Philippine law*, 10 Philippine L. J. 261-272 (1930).

Iobst, C. R. *The uniform declaratory judgment act in Pennsylvania*, 35 Dickinson L. Rev. 84-90 (1931).

Jennings, W. Ivor. *Declaratory judgments against public authorities in England*, 41 Yale L. J. 407-424 (1932).

Kerr, J. M. *Declarations of right without consequential relief*, 53 Am. L. Rev. 161-170 (1919).

————. *Declaratory judgments*, 94 Cent. L. J. 190-194 (1922).

Levi, Philip L. *Declaratory judgments*, 94 Cent. L. J. 75-85 (1922).

Lummus, H. T. *Declaratory and interpretative judgments in Massachusetts*, 14 Mass. L. Q. 1-16 (1929).

Martin, P. *The declaratory judgment*, 9 Can. B. R. 540-552 (1931).

O'Keefe, Paul. *Declaratory judgments, their constitutionality and effect*, 7 Corn. L. Q. 255-258 (1922).

Posner, L. D. *Declaratory judgments in New York*, 1 St. John's L. Rev. 129-145 (1927).

Potts, C. S. *The declaratory judgment*, 50 Tex. B. A. 65-84 (1931).

Rames, J. O. *The Colorado declaratory judgment act*, 1 Rocky Mountain L. Rev. 52-58 (1928).

Rice, W. G. *Constitutionality of the declaratory judgment*, 28 W. Va. L. Q. 1-28 (1921).

Riddell, W. R. *Declaratory judgments in Canada*, 25 Law Notes 46-49 (1921).

Schoonmaker, J. *Declaratory judgments*, 5 Minn. L. Rev. 32-38 and 172-184 (1920).

Sunderland, E. R. *The courts as authorized legal advisers of the people*, 54 Am. L. Rev. 161-192 (1920).

————. *Modern evolution in remedial rights — the declaratory judgment*, 16 Mich. L. Rev. 69-89 (1917).

————. *Preventive justice through declaratory relief*, Iowa Bar Asso. (1921) 80-97.

Torrey, James H. *The declaratory judgment*, 8 Iowa L. Bull. 81-91 (1923).

Van Hecke, M. T. *The North Carolina declaratory judgment act*, 10 N. C. L. Rev. 1-15 (1931).

Vinje, A. J. *Declaratory relief*, 4 Marquette L. Rev. 106-117 (1920).

Wagner, Robert F. *Declaratory judgments in New York.* Speech delivered . . . . at Otsego county bar association, July 2, 1927. (New York, M. B. Brown printing & binding co., 1927.)

Williams, C. *Is declaratory relief constitutional?* 13 Marquette L. Rev. 76-96 (1929).

Among some sixty-five initialed or unsigned comments and case-notes published in recent years, attention may be called to the following:

20 Columbia Law Review 106 (1920);
43 Harvard Law Review 1290 (1930);
45 Harvard Law Review 717 (1932);
45 Harvard Law Review 1089 (1932);
12 Iowa Law Review 62 (1926);
20 Michigan Law Review 775 (1922);
16 Minnesota Law Review 559 (1932);
78 U. of Pa. Law Review 907 (1930);
5 Temple Law Quarterly 117 (1930);
4 Tennessee Law Review 104 (1926);
11 Virginia Law Review 473 (1925);
38 Yale Law Journal 241 (1928).

The foreign literature on declaratory judgments is voluminous. Among the commentators on section 42 of the Indian Specific Relief Act (on declaratory decrees) the works of Banerji and Sarkar may be recommended. Among the German works on the *Feststellungsklage*, the more important are those of Wach, Degenkolb, Hellwig, Kisch, and Langheineken. Cammeo (an Italian), Parser (a Hollander), Maynard (a Frenchman), and Zumstein (a Swiss) have also written works on the subject. In Germany and Austria, there are a large number of special studies and dissertations on various aspects of the subject; among them, those by Binder, Immerwahr, Ott, Plosz, Petschek, Seidel, Sternberg, Sulzer, and Zimmermann warrant special mention.

# APPENDIX IV.

**Recent decisions of the Supreme Court of the United States involving judgments which are in effect declaratory include, among others, the following:**

*Marlin v. Lewallen*, 276 U. S. 58 (action for a judgment declaring that plaintiff as surviving husband of Creek Indian was entitled to an estate in curtesy in her land. Claim denied);

*Liberty Nat. Bank of Roanoke v. Bear*, 276 U. S. 215 (action by a judgment creditor against trustee in bankruptcy for a judgment declaring that his judgment lien was not annulled by subsequent bankruptcy. So held);

*Miller v. Schoene*, 276 U. S. 272 (action for a judgment declaring invalid an order of state entomologist to cut down plaintiff's cedar trees. Order held valid);

*Larkin v. Paugh*, 276 U. S. 431 (action for a judgment declaring that plaintiff's title under deed from the heirs was superior to defendant's title under deed from administrator);

*Jenkins v. National Surety Co.*, 277 U. S. 258 (action by a surety against receiver in bankruptcy for judgment declaring surety entitled to participate in certain surplus funds);

*Kinney-Coastal Oil Co. v. Kieffer*, 277 U. S. 488 (action by lessee of oil and gas lease against patentee of same land under homestead for judgment declaring the platting of lots for sale by latter a violation of leasing rights of former, plus injunction);

*Nielsen v. Johnson*, 279 U. S. 47 (action by administrator against state treasurer for judgment declaring that tax assessment on decedent's estate was void as contrary to a treaty. So held);

*Flink v. Paladini*, 279 U. S. 59 (proceeding for judgment declaring petitioners subject to limited liability only);

*County of Spokane, Washington v. United States*, 279 U. S. 80 (action by U. S. Commissioner of Internal Revenue against County Treasurer for judgment declaring that United States has priority over County in distribution of insolvent's funds in hands of receiver);

*Ex parte Worcester County Nat. Bank*, 279 U. S. 347 (petition for a decree declaring plaintiff national bank, as successor to state trust company, privileged to present accounts as executor of decedent's estate. Denied);

*United States v. Jackson*, 280 U. S. 183 (action to quiet title to land deeded by Indian allottee to one R. and declaring R. the owner);

*United States v. Guaranty Trust Co.*, 280 U. S. 478 (action to establish priority of United States over other creditors of insolvent estate. Denied);

*United States v. Utah*, 283 U. S. 64 (action to quiet title to the beds of described portions of certain rivers in Utah and also adjudging that [on Jan. 4, 1896] "title to the beds . . . . where these rivers were found to be non-navigable," was vested in the United States);

*Moore, Trustee in Bankruptcy, v. Bay*, 284 U. S. 4 (certiorari to review "an affirmation of an order . . . holding a chattel mortgage to be valid as to creditors whose claims came into existence subsequently to its recordation");

*Van Huffel v. Harkelrode*, 284 U. S. 225 (bill and decree to quiet title to land against a tax lien asserted by a county treasurer);

*Central Pacific Ry. Co. v. Alameda County*, 284 U. S. 463 (bill to quiet plaintiff's title to certain land in the county);

*Utah v. United States*, 284 U. S. 534 (decree which "adjudged that the United States was entitled to certain lands described in the bill of the United States and that the state's title is impressed with a trust in favor of the United States"; coercive relief, if any, was ancillary);

*Spencer Kellogg & Sons v. Hicks*, 285 U. S. 502 (action to limit liability in a marine accident);

*United States v. Smith*, 286 U. S. 6 (quo warranto as to whether defendant legally held office in the Federal Power Commission and whether Senate could withdraw its confirmation of a nomination after the President had been notified thereof; "Smith asserts that he was duly appointed to office . . . The Senate disputes the claim");

*Page, Trustee, v. Arkansas Natural Gas Corp.*, 286 U. S. 269 (action to quiet title. Issue, whether lease was property of the bankrupt).

# APPENDIX V.

**In the following cases a declaration is asked for, plus an injunction or other relief, as incidental or ancillary thereto. The declaration and the relief prayed for are stated after the citation of the case.**

*John P. King Mfg. Co. v. City Council of Augusta*, 277 U. S. 100 (declaration that ordinance invalid, plus injunction);

*Nectow v. City of Cambridge*, 277 U. S. 183 (declaration that zoning ordinance invalid, plus mandatory injunction to issue permit to build);

*Lehigh Valley R. Co. v. Board of Public Utility Com'rs*, 278 U. S. 24 (declaration that administrative order unreasonable, plus injunction);

*Herkness v. Irion, Commissioner of Conservation*, 278 U. S. 92 (declaration of plaintiff's privilege to erect carbon black factory, plus injunction to prevent state interference by refusal of license);

*Hunt, Governor of Arizona, v. United States*, 278 U. S. 96 (declaration that Governor had no right to arrest United States agents, plus injunction restraining such arrest);

*Louis K. Liggett Co. v. Baldridge, Attorney-General*, 278 U. S. 105 (declaration that statute was invalid, plus injunction);

*Washington ex rel, Seattle Title Trust Co. v. Roberge*, 278 U. S. 116 (declaration that condition of zoning law requiring consent of two-thirds of property owners was invalid, plus *mandamus* to issue permit);

*Williams v. Standard Oil Co.*, 278 U. S. 235 (declaration that statute regulating prices invalid, plus injunction);

*United States v. Missouri Pacific Ry. Co.*, 278 U. S. 269 (declaration that order of I. C. C. invalid, plus injunction);

*Wisconsin v. Illinois*, 278 U. S. 367 (declaration that water diversion invalid, plus injunction);

*Frost v. Corporation Commission of Okla.*, 278 U. S. 515 (declaration that mandatory license was invalid, plus injunction);

*Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159 (declaration that contract rates confiscatory, plus injunction);

*Leonard v. Earle*, 279 U. S. 392 (declaration that statute requiring surrender of 10% of oyster shells as condition of license invalid, plus *mandamus* to issue without condition);

*St. Louis-San Francisco Ry. Co. v. Alabama Public Service Comm.*, 279 U. S. 560 ("declaration" that statute forbidding abandonment of service invalid, plus injunction);

*Standard Oil Co. v. City of Marysville*, 279 U. S. 582 (declaration that ordinance requiring storage tanks underground invalid, plus injunction);

*White River Lumber Co. v. Arkansas*, 279 U. S. 692 (declaration that back taxes were due "and declaring them a lien on the land taxed");

*Kirk v. Maumee Valley Elec. Co.*, 279 U. S. 797 (declaration that plaintiff was immune from interference with his water rights, plus injunction);

*Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U. S. 1 (declaration that plaintiff entitled to certain appointment, plus direction to appoint);

*Atlantic Coast Line Ry. v. United States*, 284 U. S. 288 (bill to set aside order of I. C. C.; decree declaring order proper and valid);

*First Nat. Bank of Boston, Ex'r, v. Maine*, 284 U. S. 312 (action to collect tax referred on agreed statement of facts. Said the Supreme Court: "The question presented for our determination by this appeal is whether the State of Maine has power under the Fourteenth Amendment to impose a tax." Judgment was rendered denying the power of Maine to tax);

*Hodge Drive-It-Yourself Co. v. Cincinnati*, 284 U. S. 335 (bill to enjoin city ordinance; judgment declaring it valid);

*Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U. S. 147 (injunction to restrain collection of state tax on sale of gasoline; judgment declaring the tax valid);

*Smiley v. Holm, Sec. of State*, 285 U. S. 355 (bill to enjoin Secretary of State from redistricting state for elections. "The bill sought to have all filings for nomination *declared illegal*");

*Fox Film Corp v. Doyal*, 286 U. S. 123 (injunction to restrain collection of state taxes on copyright royalties; judgment declaring tax valid).

# SUPREME COURT OF THE UNITED STATES.

No. 176.—October Term, 1932.

The Nashville, Chattanooga & St. Louis Railway, Appellant,
*vs.*
Roy C. Wallace, Comptroller of the Treasury of the State of Tennessee, et al., etc.

Appeal from the Supreme Court of the State of Tennessee.

[February 6, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

Appellant brought suit in the Chancery Court of Davidson County, Tennessee, under the Uniform Declaratory Judgments Act of that state,[1] c. 29, Tennessee Public Acts, 1923, to secure a judicial declaration that a state excise tax levied on the storage of gasoline, c. 58, Tennessee Public Acts, 1923, as amended by c. 67, Tennessee Public Acts, 1925, is, as applied to appellant, invalid under the commerce clause and the Fourteenth Amendment of the Federal Constitution. A decree for appellees was affirmed by the Supreme Court of the State, — Tenn. —, and the case comes here on appeal under § 237 (a) of the Judicial Code.

After the jurisdictional statement required by Rule 12 was submitted, this Court, in ordering the cause set down for argument, invited the attention of counsel to the question "whether a case or controversy is presented in view of the nature of the proceed-

[1]The procedure authorized by this statute has been extensively adopted both in this country and abroad. It is said that the Uniform Act is in force in 16 of the states and Porto Rico and that similar statutes have been enacted in 13 states, Hawaii and the Philippines. For a discussion of the history of this procedural device in France, Germany, Spain, Spanish America, Scotland, England and India, as well as in the United States, and the types of controversies in which it has been invoked, see Edwin M. Borchard, The Declaratory Judgment—A Needed Procedural Reform, 28 Yale L. J. 1, 105; Judicial Relief from Peril and Insecurity, 45 Harv. L. Rev. 793, 806; The Constitutionality of Declaratory Judgments, 31 Columbia L. Rev. 561.

ings in the state court". This preliminary question, which has been elaborately briefed and argued, must first be considered, for the judicial power with which this Court is invested by Art. 3, § 1 of the Constitution, extends by Art. 3, § 2, only to "cases" and "controversies"; if no "case" or "controversy" is presented for decision, we are without power to review the decree of the court below. *Muskrat* v. *United States,* 219 U. S. 346.

In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance. See *Fidelity National Bank* v. *Swope,* 274 U. S. 123, compare *Gasoline Products Co. Inc.,* v. *Champlin Refining Co.,* 283 U. S. 494, 498. Hence, we look not to the label which the legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance, as "declaratory", but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts.

Section 1 of the Tennessee Declaratory Judgments Act confers jurisdiction on courts of record "to declare rights . . . whether or not further relief is or could be claimed" and provides that "no action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and such declaration shall have the force and effect of a final judgment or decree." By § 2 it is provided that "any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights . . . thereunder."

Under § 6, the Court may refuse to render a declaratory judgment where, if rendered, it "would not terminate the uncertainty or controversy giving rise to the proceeding". Declaratory judgments may, in accordance with § 7, be reviewed as are other orders, judgments or decrees, and under § 8 "further relief based on a declaratory judgment or decree may be granted whenever necessary or proper". Section 11 requires that "when declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

This statute has often been considered by the highest court of Tennessee, which has consistently held that its provisions may only be invoked when the complainant asserts rights which are challenged by the defendant, and presents for decision an actual controversy to which he is a party, capable of final adjudication by the judgment or decree to be rendered. *Miller* v. *Miller*, 149 Tenn. 463; *Goetz* v. *Smith*, 152 Tenn. 451, 465; *Hodges* v. *Hamblen County*, 152 Tenn. 395; *Cummings* v. *Shipp*, 156 Tenn. 595; *Tennessee Eastern Electric Co.* v. *Hannah*, 157 Tenn. 582, 587; *Perry* v. *City of Elizabethton*, 160 Tenn. 102, 106; *Nashville Trust Co.* v. *Dake*, 162 Tenn. 356, 359. It has also held that no judgment or decree will be rendered when all the parties who will be adversely affected by it are not before the Court. *Harrell* v. *American Home Mortgage Co.*, 16 Tenn. 646; *Sadler* v. *Mitchell*, 162 Tenn. 363, 367.

Proceeding in accordance with this statute, appellant filed its bill of complaint in the state Chancery Court, joining as defendants the appellees, the Attorney General and the state officials charged with the duty of collecting the gasoline privilege tax imposed by the Tennessee statute. The complaint alleged that appellant is engaged in purchasing gasoline outside the state, which it stores within the state pending its use within and without the state in the conduct of appellant's business as an interstate rail carrier; that appellees assert that the statute taxes the privilege of storing gasoline within the state and is applicable to appellant; that they have demanded payment of the tax in a specified amount and have determined to enforce their demand and that, under the circumstances alleged, the statute as applied to appellant is invalid under the commerce clause and the Fourteenth Amendment. The relief prayed was that the taxing act be declared unconstitutional as applied to appellant. The Chancery Court sustained the appellees' demurrer to the sufficiency in law of the allegations relied on to establish the unconstitutionality of the tax. Its final decree dismissing the bill on the merits has been affirmed by the highest court of the state.

That the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin collection of the tax cannot be questioned. See *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378; compare *Terrace* v. *Thompson*, 263 U. S. 197; *Pierce* v. *Society of Sisters*, 268

U. S. 510; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365. The proceeding terminating in the decree below, unlike that in *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U. S. 300; *Muskrat* v. *United States*, 219 U. S. 346, was between adverse parties, seeking a determination of their legal rights upon the facts alleged in the bill and admitted by the demurrer. Unlike *Fairchild* v. *Hughes*, 258 U. S. 126; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158; *Massachusetts* v. *Mellon*, 262 U. S. 447; *New Jersey* v. *Sargent*, 269 U. S. 328, valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree by the decision of the question of law; and unlike *Luther* v. *Borden*, 7 How. 1; *Field* v. *Clark*, 143 U. S. 649; *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, the question lends itself to judicial determination and is of the kind which this Court traditionally decides. The relief sought is a definitive adjudication of the disputed constitutional right of the appellant, in the circumstances alleged, to be free from the tax, see *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 724; and that adjudication is not, as in *Gordon* v. *United States*, 2 Wall. 561, and *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, subject to revision by some other and more authoritative agency. Obviously the appellant, whose duty to pay the tax will be determined by the decision of this case, is not attempting to secure an abstract determination by the Court of the validity of a statute, compare *Muskrat* v. *United States, supra*, 361; *Texas* v. *Interstate Commerce Commission, supra*, 162; or a decision advising what the law would be on an uncertain or hypothetical state of facts, as was thought to be the case in *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, and *Willing* v. *Chicago Auditorium Co.*, 277 U. S. 274; see also *Warehouse Co.* v. *Tobacco Growers*, 276 U. S. 71, 88; compare *Arizona* v. *California*, 283 U. S. 423, 463. Thus the narrow question presented for determination is whether the controversy before us, which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from the collection of the tax.

While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. *Fidelity National Bank* v. *Swope, supra,* 132. This Court has often exerted its judicial power to adjudicate boundaries between states, although it gave no injunction or other relief beyond the determination of the legal rights which were the subject of controversy between the parties, *Louisiana* v. *Mississippi,* 202 U. S. 1; *Arkansas* v. *Tennessee,* 246 U. S. 158; *Georgia* v. *South Carolina,* 257 U. S. 516; *Oklahoma* v. *Texas,* 272 U. S. 21; *Michigan* v. *Wisconsin,* 272 U. S. 398, and to review judgments of the Court of Claims, although no process issues against the Government. *United States* v. *Jones,* 119 U. S. 477; compare *District of Columbia* v. *Eslin,* 183 U. S. 62; *Ex parte Pocono Pines Hotels Co.,* 285 U. S. 526, reported below in 73 Ct. Cls. 447. As we said in *Fidelity National Bank* v. *Swope, supra,* 132, "Naturalization proceedings, *Tutun* v. *United States,* 270 U. S. 568; suits to determine a matrimonial or other status; suits for instruction to a trustee or for the construction of a will; *Traphagen* v. *Levy,* 45 N. J. Eq. 448; bills of interpleader so far as the stakeholder is concerned, *Wakeman* v. *Kingsland,* 46 N. J. Eq. 113; bills to quiet title where the claimant rests his title on adverse possession, *Sharon* v. *Tucker,* 144 U. S. 533; are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgment into effect, in the sense that damages are required to be paid or acts to be performed by the parties." See also *Old Colony Trust Co.* v. *Commissioner, supra,* 725; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423.

The issues raised here are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystalize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a

state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy, which is finally determined by the judgment below. See *Old Colony Trust Co.* v. *Commissioner, supra,* 724. As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial. Such was the purport and effect of our decision in *Fidelity National Bank* v. *Swope, supra,* where it was held that a final judgment rendered by a state court in an adversary proceeding brought under a state statute to determine the validity of liens about to be imposed for benefits assessed under a city improvement ordinance, presented a case within the appellate jurisdiction of this Court. Accordingly, we must consider the constitutional questions raised by the appeal.

Chapter 58, Tennessee Public Acts, 1923, as amended by Chapter 67, Tennessee Public Acts, 1925, is said, by its caption, to impose a privilege tax "on persons . . . and corporations engaged in or carrying on the business . . . of selling or storing or distributing gasoline . . ." within the state at the rate of 2¢ per gallon on the gasoline sold or stored, the tax "to be used solely in the construction and maintenance of a highway system in the state". But section 3 provides: "The tax imposed by this Act shall apply to persons, firms or corporations, dealers or distributors storing any of the products mentioned in this Act and distributing the same or allowing the same to be withdrawn from storage whether such withdrawal be for sale or other use. . . ." Storage of the gasoline and withdrawal of it from storage within the state for use or sale, are, as the state Supreme Court has held, the events which, by the very terms of the statute, call it into operation. *Foster & Creighton Co.* v. *Graham,* 154 Tenn. 412, 420; *Quick Service Tire Co.* v. *Smith,* 156 Tenn. 96, 102.

Appellant, an interstate rail carrier, purchases large quantities of gasoline outside the state of Tennessee and brings it into the state in tank cars, from which it is unloaded and placed in its own storage tanks. None of it is sold by appellant, but all is withdrawn and used by it as a source of motive power in interstate railway operation in Tennessee, Kentucky, Alabama and Georgia. Storage of the gasoline is a preliminary step to such use in interstate commerce. The tax is assailed both on the ground that it is imposed on the gasoline while still a subject of interstate commerce in the course of transportation from points of origin to points outside the state of Tennessee; and on the ground that it is in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier, and is thus an unconstitutional burden on interstate commerce.

The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. *General Oil Co.* v. *Crain*, 209 U. S. 211; *Bacon* v. *Illinois*, 227 U. S. 504; *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665, 669; *Hart Refineries* v. *Harmon*, 278 U. S. 499; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472. The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced. Neither the appellant, the shippers, nor the carrier, at the time of the shipment of the gasoline from points of origin, arranged a destination for any part of the oil other than the appellant's storage tanks in Tennessee. Although in the usual course of business a variable and undefined part of it, when segregated for that purpose, would again be transported across state boundaries, appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose. As nothing in the transaction before the withdrawal from storage in Tennessee can be said to have given any ascertainable part of the gasoline a destination to points beyond the state, the case is distinguishable from *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, and *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111. The oil in storage was not a subject of interstate commerce and so was a part of the common mass of

goods within the state, subject to local taxation. *General Oil Co.* v. *Crain, supra; Susquehanna Coal Co.* v. *South Amboy, supra; Bacon* v. *Illinois, supra;* compare *Atlantic Coast Line R. R. Co.* v. *Standard Oil Co.*, 275 U. S. 257.

We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, subsequent to the incidence of the tax, as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power, *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470; *Sprout* v. *South Bend*, 277 U. S. 163, 170, 171; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 297, and a tax levied upon the use of gasoline in generating motive power for a ferry boat used exclusively in interstate commerce has been held to be so direct and immediate a burden on the commerce itself as to be invalid. *Helson* v. *Kentucky*, 279 U. S. 245.

But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its prospective use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock or other instruments of interstate commerce, which are subject to local property taxes. *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; *Western Union Telegraph Co.* v. *Gottlieb*, 190 U. S. 412; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 220; see *General American Tank Car Corp.* v. *Day*, 270 U. S. 367; *Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 245, compare *St. Louis, San Francisco Ry. Co.* v. *Middelkamp*, 256 U. S. 226, 231; *St. Louis, Southwestern Ry.* v. *Arkansas*, 235 U. S. 350; *Kansas City Ry.* v. *Kansas*, 240 U. S. 227; *Kansas City, etc. R. R. Co.* v. *Stiles*, 242 U. S. 111; *Southern Ry. Co.* v. *Watts*, 260 U. S. 519. The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constitutent elements. See *Bromley* v. *McCaughn*, 280 U. S. 124, 136-138. Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's

ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra.* Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. See *Eastern Air Transport* v. *Tax Commission,* 285 U. S. 147.

Appellant objects that the tax violates the Fourteenth Amendment in that it is levied as a charge for the use of the highways which appellant does not use. But the levy is a tax, not a toll or charge for use of the highways, see *Carley & Hamilton* v. *Snook,* 281 U. S. 66, and the constitutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by taxation. *Carley & Hamilton* v. *Snook, supra; St. Louis & Southwestern Ry. Co.* v. *Nattin,* 277 U. S. 157, 159. The allegations of the bill showing that a heavier burden of taxation is imposed upon railroads than upon common carriers by motor bus, examined in the light of the applicable statutes of the State, fall short of alleging a discrimination forbidden by either the commerce clause or the Fourteenth Amendment.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*